IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HAROLD J. BORN, et al., Plaintiffs,	)	
vs.	)	No. 78-C-134-B
BRANIFF AIRWAYS INCORPORATED d/b/a BRANIFF INTERNATIONAL AIRWAYS, a corporation, Defendant.	)	

FILED

MAY 31 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

STIPULATION AND ORDER
OF DISMISSAL WITH PREJUDICE

That Plaintiffs and Defendant, having stated that the above-entitled action, and each and every claim for relief asserted therein by Plaintiffs, may be dismissed with prejudice, each party to bear its, his or her own costs, and the Court being fully advised,

IT IS ORDERED that this cause of action and complaint, each and every claim for relief asserted therein be and the same are hereby dismissed with prejudice to bringing of a future action thereon, and that each party hereto shall bear its, his or her own costs.

DATED this 31st day of May, 1979.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 79-C-133-C
HOWARD J. ROSENTHAL a/k/a HOWARD JAY ROSENTHAL, Defendant.	)	FILED MAY 30 1979 Jack C. Silver, Clerk U. S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for consideration this 30th day of May, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Howard J. Rosenthal a/k/a Howard Jay Rosenthal, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Howard J. Rosenthal a/k/a Howard Jay Rosenthal, was personally served with Summons and Complaint on May 2, 1979, as appears on the U. S. Marshal's Service herein, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Howard J. Rosenthal a/k/a Howard Jay Rosenthal, for the sum of $1,163.01, plus the costs of this action accrued and accruing.

/s/ H. Dale Cook
UNITED STATES DISTRICT JUDGE

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

THE F & M BANK & TRUST COMPANY, Trustee,	)	
Plaintiff,	)	
v.	)	No. 76-C-127-B
G. L. BARTLETT & CO., INC., et al.,	)	
Defendants.	)	

FINAL ORDER OF DISMISSAL

On December 29, 1978 the Court made an Order dismissing the action subject to time being given for joinder or substitution of any bondholder or bondholders whom the plaintiff F & M Bank & Trust Company, as Trustee, undertook to represent in this action, as plaintiff, and prescribing a time within which to do so. Thereafter an order was entered by the court extending such time to 60 days from December 29, 1978, or until February 27, 1979. On the 5th day of March, 1979 the court made a further order extending the time for an additional 60 days, commencing February 27, 1979, or until April 28, 1979. Such time has elapsed, and there has been no appearance of any joined or substituting party plaintiff.

It is therefore ordered and adjudged that this action be and is hereby dismissed.

Dated this 30th day of ~~April~~ May, 1979.

/s/ H. Dale Cook

UNITED STATES DISTRICT JUDGE

Approved as to form:

REUBEN DAVIS

-of-

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Stewart Securities Corporation

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

SHARON MELTON, Plaintiff, vs. N.L. THOMPSON, Individually and as a Police Officer in the Police Department of the City of Tulsa, Defendant.	)	CASE NO. 77-C-142-B

FILED

MAY 30 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

STIPULATION OF VOLUNTARY DISMISSAL

The Defendant, by stipulation with the Plaintiff, hereby agrees to the dismissal of this action pursuant to the Federal Ruels of Civil Procedure, Rule 41(a)(1)(ii).

Approved By:

Sharon Melton
SHARON MELTON, PLAINTIFF

Thomas E. Salisbury
THOMAS E. SALISBURY
Attorney for Plaintiff
1634 South Boulder
Tulsa, Oklahoma 74119
(918) 599-9155

David L. Pauling
DAVID L. PAULING
Attorney for Defendant

CERTIFICATE OF MAILING

I, Thomas E. Salisbury, certify that I mailed a true and correct copy of the above and foregoing Stipulation of Voluntary Dismissal, with adequate postage pre-paid, to the Attorney for Defendant, David L. Pauling, Assistant City Attorney, 200 Civic Center, Room 1012, Tulsa, Oklahoma 74103, this 29th day of May, 1979.

Thomas E. Salisbury
THOMAS E. SALSIBURY

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

EUGENE S. ADOLPH,

Plaintiff,

v.

JOSEPH A. CALIFANO, JR., Secretary of Health, Education, and Welfare,

Defendant.

No. 78-C-334-D

FILED

MAY 30 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT

This cause having been considered by the Court on the pleadings, the entire record certified to this Court by the Defendant Secretary of Health, Education and Welfare (Secretary), and after due proceedings had, and upon examination of the pleadings and record filed herein, including the Briefs submitted by the parties, the Court is of the opinion as shown by its Memorandum Opinion filed herein of even date that the final decision of the Secretary is supported by substantial evidence as required by the Social Security Act, and should be affirmed.

IT IS THEREFORE ORDERED, DECREED AND ADJUDGED that the final decision of the Secretary should be and hereby is affirmed.

Dated this 30 day of May, 1979.

Fred Daugherty
United States District Judge

11-

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

EUGENE S. ADOLPH,

Plaintiff,

v.

JOSEPH A. CALIFANO, JR., Secretary of Health, Education, and Welfare,

Defendant.

No. 78-C-334-D

FILED

MAY 30 1979

Clerk
U. S. DISTRICT COURT

MEMORANDUM OPINION

Plaintiff brings this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final administrative decision of the Secretary of Health, Education and Welfare denying his application for disability insurance benefits. From the administrative record before the Court, it appears that Plaintiff filed his application for disability insurance benefits on December 15, 1976 (Tr. 46-49), alleging that he had been unable to work since June 30, 1972, but that he wished to establish January 1, 1975 as the date of onset of his disability.[1/] Plaintiff's application was denied initially (Tr. 50-51) and again upon reconsideration (Tr. 53-54). Plaintiff requested a hearing, and the Administrative Law Judge before whom Plaintiff appeared found that Plaintiff was not entitled to disability insurance benefits (Tr. 7-13). The Administrative Law Judge's decision became the final decision of the Defendant when the Appeals Council affirmed it on June 8, 1978 (Tr. 3). Plaintiff then brought this action seeking judicial review.

An applicant for Social Security disability insurance benefits has the burden of establishing that he was disabled on or before the date on which he last met the statutory earnings requirements. McMillin v. Gardner, 384 F.2d 596 (Tenth Cir. 1967); Stevens v. Mathews, 418 F.Supp. 881 (W.D.Okla. 1976); Dicks v. Weinberger, 390 F.Supp. 600 (N.D.Okla. 1974); see Johnson v. Finch, 437 F.2d

1/ A similar application was filed by Plaintiff on March 26, 1975, (Tr. 40-43). This application was denied on May 1, 1975 (Tr. 44-45) and Plaintiff did not request reconsideration of the denial. This application is not, therefore, before the Court for review.

1321 (Tenth Cir. 1971). For the purposes of Plaintiff's claims, "disability" means inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months. 42 U.S.C. §§ 416(i)(1) and 423(d)(1)(a). The scope of the Court's review authority is narrowly limited by 42 U.S.C. § 405(g). The Secretary's decision must be affirmed if supported by substantial evidence. Gardner v. Bishop, 362 F.2d 917 (Tenth Cir. 1966); Stevens v. Mathews, supra. Substantial evidence is more than a scintilla. It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971); Stevens v. Mathews, supra. However, substantial evidence is less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Consolo v. Federal Maritime Commission, 383 U.S. 607, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966); Stevens v. Mathews, supra.

In conducting this judicial review, it is the duty of this Court to examine the facts contained in the record, evaluate the conflicts and make a determination therefrom whether the facts support the several elements which make up the ultimate administrative decision. Heber Valley Milk Co. v. Butz, 503 F.2d 96 (Tenth Cir. 1974); Nickol v. United States, 501 F.2d 1389 (Tenth Cir. 1974); Stevens v. Mathews, supra. In this case, the ultimate administrative decision is evidenced by the findings of the Administrative Law Judge before whom Plaintiff appeared. Those findings were as follows:

> 1. Claimant stated he was born February 1, 1918, completed the ninth grade and worked principally as a laborer in a steel mill.[2/]

[2/] The finding that claimant had worked "principally as a laborer in a steel mill" is evidently a clerical error, since it is clear from the opinion of the Administrative Law Judge that he found that claimant had been "self-employed most of his life and last worked in June 1972 as owner and operator of a bar and for a short while in the latter part of 1972 as a roofer" (Tr. 10), as is actually the case.

2. Claimant met the special earnings requirement of the Act for disability purposes through December 31, 1976.

3. Claimant suffers from an anal fistula, hernia and residuals of decompression of the nerve root, L4/L5, left.

4. While claimant has stated he is troubled with pain all over his body and especially in his low back and legs, it does not appear that such pain is of the extent, frequency and duration necessary in order to be considered disabled under the provisions of the Social Security Act, as amended.

5. The claimant has not been prevented from engaging in all substantial gainful activity for any continuous period beginning on or before the date of this decision due to an impairment or combination of impairments which has lasted or would be expected to last for a continuous period of at least 12 months.

6. Claimant does not have a physical or mental impairment that would prevent him from engaging in his former work activity.

7. The claimant was not under a "disability" as defined in the Social Security Act, as amended, at any time prior to the date of this decision.

The elements of proof which should be considered in determining whether Plaintiff has established a disability within the meaning of the Act are: (1) objective medical facts; (2) medical opinions; (3) subjective evidence of pain and disability; and (4) the claimant's age, education and work experience. Hicks v. Gardner, 393 F.2d 299 (Fourth Cir. 1968); Stevens v. Mathews, supra; Morgan v. Gardner, 254 F.Supp. 977 (N.D.Okla. 1966). The evidence in the record before the Court will be summarized below.

MEDICAL EVIDENCE

Plaintiff was hospitalized on February 10, 1972, at the Veterans Administration Center in Wichita, Kansas, complaining of lower back pain. A myelogram was performed, revealing a defect on the left side of Plaintiff's spine at the L4-L5 level. Plaintiff was hesitant about going on with surgery and was therefore discharged on February 24, 1972, with instructions that he would be seen as an outpatient. Plaintiff was readmitted on May 23, 1972 because of a possible herniated nucleus pulposus on the left side. Exploratory surgery was conducted at L4-L5, but no evidence of any

disc herniation was found. Decompression of the nerve root was performed, however. Plaintiff obtained so much relief from this surgery that he did not take very many pain pills (Tr. 116). During this admission, Plaintiff also had a lipoma excised from his right shoulder and a tooth removed. He was also given attention for his psoriasis. A proctoscopy was done, disclosing a possibility of chronic granulomatous colitis. Plaintiff improved and was discharged as improved on June 24, 1972. He returned to the orthopedic clinic on July 25, 1972, at which time it was found that his operative wound had healed, his leg pain was gone, his deep tendon reflexes were symmetrical, straight leg raising was negative to 90 degrees bilaterally, and there was no loss of motion in his legs (Tr. 117).

On June 13, 1973, Plaintiff was examined at the Veterans Adminstration Hospital in Oklahoma City (Tr. 111-115). This examination disclosed: Straight leg raising was negative bilaterally; the lumbar spine had a forward flexion of 50 degrees, extension backward of 30 degrees and lateral flexion of 30 degrees; the left patella reflex was slightly less than the right; a well healed surgical scar 6 inches in length appeared over the lumbar area; and there was no evidence of anesthesia or muscle change. Plaintiff was found to favor his left leg when walking (Tr. 113). X-rays revealed mild osteoarthritic changes in the lumbar spine, but the sacroiliac and hip joints appeared to be normal. Plaintiff's cardiovascular shadow appeared normal, his lung fields were clear, and his diaphragm and costophrenic angles appeared to be normal (Tr. 115). The diagnosis at this time was that Plaintiff was experiencing the residuals of post-operative lumbar spine surgery (Tr. 114).

Plaintiff was seen at the Veterans Administration Hospital Clinic on October 8, 1974, complaining of back pain and an inability to sit or stand for any period or find a comfortable position. Hospitalization was recommended (Tr. 104).

On January 6, 1975, Plaintiff entered the Veterans Administration Hospital in Muskogee. Plaintiff's physical examination disclosed scattered expiratory wheezes in the upper left lung; a

regular heart rate with no murmurs or gallops; forward flexion of the back to 45 degrees; straight leg raising bilaterally positive, the pain being confined to the lumbar area; and intact reflexes, pulses and sensation. Plaintiff's chest X-rays were within normal limits, and his lumbar spine X-rays disclosed minimal osteoarthritic change with no narrowing of the intervertebral spaces. Plaintiff's hospital course was uneventful. He received conservative treatment consisting of muscle relaxants, mild analgesics, bed rest with pelvic traction and physical therapy consisting of heat, massage and postural exercises for the low back. A good possibility of the existence of a strong neuropsychiatric overlay was noted. By January 27, 1975, Plaintiff wished to go home, feeling that nothing more could be done for him. He was discharged regular without medications (Tr. 110).

On July 23, 1975, an orthopedic examination of the Plaintiff was conducted at the Veterans Administration Hospital in Fayetteville, Arkansas. The examination disclosed that Plaintiff was a well nourished, well developed male, who walked with a marked forward list to the left and who limped on his left leg. Plaintiff was found to have a 20% loss of the normal range of motion in his cervical spine and a 60% loss of the normal range of motion in the lumbar, lumbosacral spine, with marked spasm of the erector spinae muscles. No restriction of motion was found in Plaintiff's fingers, wrists, elbows, shoulders, ankles, knees or hips. Plaintiff's reflexes were normal and straight leg raising could be accomplished to 90 degrees bilaterally. X-rays of Plaintiff's lumbar, lumbosacral spine disclosed a slight narrowing of the intervertebral disc space between L4 and L5, and L5 and S1, though vertebral body heights were well maintained and the disc spaces showed no abnormalities. Spurring was found anteriorally and at the L3-L4 interspace. Plaintiff's sacroiliac joints were unremarkable and no evidence of spondylolisthesis was present. The impression was post laminectomy syndrome with intervertebral disc degenerative changes between L4 and L5 and L5 and S1, with minimal disabling residuals (Tr. 108-109).

On March 26, 1976, Plaintiff was admitted to the Veterans Administration Center in Wichita, Kansas, complaining of lower back pain. The orthopedic examination disclosed severe muscle spasms along the lumbar and perispinal musculature. Deep tendon reflexes at the knees and ankles were plus two bilaterally, and straight leg raising was positive to 30 degrees on the left and positive on the right to 70 degrees. X-rays revealed slight marginal osteoarthritic changes at L4-L5. Plaintiff's interspaces appeared to be of normal width, with his sacroiliac and hip joints grossly negative. Plaintiff was treated with traction and analgesics after which he did much better. Plaintiff was discharged on March 29, 1976, to be seen in the clinic as needed (Tr. 105-106).

On July 13, 1976, Plaintiff returned to the clinic, complaining of toothache. He was referred to a dentist, and three teeth were extracted without incident (Tr. 103-104).

On January 26, 1977, Plaintiff was examined by Terrill H. Simmons, M. D., an orthopedic surgeon (Tr. 121). Plaintiff presented a history of having originally injured his back in 1940 while in military service. Physical examination of the Plaintiff revealed that he was capable of forward flexion to within four inches of the floor, full extension, and normal right and left bending. There was no evidence of muscle spasm. Full range of motion in both hips was discovered. Straight leg raising to 45 degrees bilaterally was possible before Plaintiff complained of pain, but Plaintiff was also able to sit with his hips flexed to 90 degrees and his knees extended. Plaintiff's knees were stable in the anterior, posterior, medial and lateral planes, though some crepitation was noted, and Plaintiff complained of pain with any movement of the knees. No neurological deficits were found, Plaintiff's reflexes were brisk and his motor strength was within normal limits. X-rays of the lumbar spine revealed disc space narrowing and evidence of osteoarthritic changes. X-rays of Plaintiff's knees disclosed mild to moderate evidence of osteoarthritic changes. Doctor Simmons' diagnosis was: (1) Osteoarthritis of the lumbar spine;

(2) Status post lumbar laminectomy-discectomy of the lumbar spine; and (3) Degenerative joint disease, early of the left and of the right knees, left greater than right. Doctor Simmons felt that Plaintiff was having significant back pain and would probably experience difficulty in prolonged standing, bending or working in a squatted position, as well as lifting or carrying heavy objects. (Tr. 119-120).

It also appears from the record that Plaintiff is now receiving a disability pension from the Veterans Administration (Tr. 88-101), and has been receiving such disability benefits in varying amounts, for some time. This fact was duly considered by the Administrative Law Judge (Tr. 12).

SUBJECTIVE EVIDENCE

In his application for disability insurance benefits (Tr. 46-49), Plaintiff stated that he was prevented from working because of "ruptured disc, bad back, bad legs and arms, osteoarthritis", and a "bad nerve problem."

At the administrative hearing held herein on November 28, 1977 (Tr. 17-39), Plaintiff testified that the last work he had done had been some roofing work in early 1973 (Tr. 25). Plaintiff testified that he had closed the tavern he ran in June of 1972 and never reopened it (Tr. 25-26). He stated that he stopped operating his tavern because he hurt all over, and the pain was so great that he was prevented from doing anything (Tr. 27). He further testified that his spinal injury affects his left leg, causing him to fall at times. Plaintiff testified to having used both a cane and crutches, as well as a wheelchair occasionally (Tr. 29-30). Plaintiff also stated that he wore a chairback brace at all times (Tr. 30). He testified that he was unable to work because no one would hire him due to the fact that he would fail the examination by the insurance doctor because of his spinal injury (Tr. 29). Plaintiff testified that he spent his time reading ancient history and talking to acquaintances (Tr. 35).

VOCATIONAL DATA

Plaintiff is presently sixty-one years old (Tr. 24), completed the ninth grade (Tr. 25), and received training as an aircraft mechanic while in the Air Force (Tr. 25). Plaintiff was self-employed for most of his life, working for a time as the owner and operator of a tavern and for a short time as a roofer (Tr. 25-26).

CONCLUSION

The final administrative decision in this case is that while Plaintiff suffers from some physical impairments, these impairments were not so severe as to prevent Plaintiff from engaging in any substantial activity. The reports of Plaintiff's hospitalizations show that he was treated for his condition, showed improvement, and was released. Dr. Simmons concluded that Plaintiff would experience physical difficulty in performing certain tasks. The fact that the Plaintiff was receiving benefits from the Veterans Administration was considered by the Administrative Law Judge, but as he correctly noted, it was not binding upon him in his determination of the Plaintiff's entitlement for disability benefits under the Social Security Act. The Court has thoroughly examined the administrative record in this case, and finds and concludes that there is substantial evidence in the record to support the Secretary's decision that Plaintiff was not disabled. Accordingly, the decision should be affirmed and a Judgment of Affirmance will be entered this date.

In his Brief, Plaintiff argues in the alternative that this matter should be remanded for the presentation of additional evidence. No Motion to Remand was previously filed.

42 U.S.C. §405(g) provides that the Court, may at any time, for good cause shown, order additional evidence taken before the Secretary. In determining whether good cause for a remand to the Secretary exists, it must be remembered that the Social Security Act is to be liberally construed as an aid to achievement of its Congressional purposes and objections and narrow technicalities which thwart its purposes are not to be adopted. Schroeder v. Hobby, 222 F.2d 713 (Tenth Cir. 1955). In these circumstances courts must

not require a technical showing of good cause as would justify the vacation of a judgment or the granting of a new trial. Wesley v. Secretary of Health, Education and Welfare, 385 F.Supp. 863 (D. D.C. 1974); Epperly v. Richardson, 349 F.Supp. 56 (W.D.Va. 1972); Martin v. Richardson, 325 F.Supp. 686 (W.D.Va. 1971); Sage v. Celebrezze, 246 F.Supp.285 (W.D.Va. 1965); Blanscet v. Ribicoff, 201 F.Supp. 257 (W.D.Ark. 1962).

Notwithstanding the liberal reading which should be given motions to remand made pursuant to 42 U.S.C. §405(g), the Movant has the burden of showing the general nature of the evidence he wants introduced and that it bears directly and substantially on the matter in dispute. Davila v. Weinberger, 408 F.Supp. 738 (E.D. Pa. 1976); Long v. Richardson, 334 F.Supp. 305 (W.D.Va. 1971); Hallard v. Fleming, 167 F.Supp. 205 (W.D.Ark. 1958); see Hutchinson v. Weinberger, 399 F.Supp. 426 (E.D.Mich. 1975). Remand should be granted where no party will be prejudiced by the acceptance of additional evidence and the evidence bears on the matter in dispute. Epperly v. Richardson, supra; Martin v. Richardson, supra; Sage v. Celebrezze, supra; Blanscet v. Ribicoff, supra.

Plaintiff argues in support of his alternative motion to remand that he will introduce upon rehearing evidence concerning the opinion of Dr. Daugherty, who has treated Plaintiff (Tr. 31-33), as to whether Plaintiff is disabled. Plaintiff further asserts that upon remand he will "diligently inquire" of Dr. Daugherty and other doctors as to their opinions concerning the plaintiff's health and the effect of certain medications, as well as the extent of Plaintiff's pain.

It appears from the record before the Court that the Administrative Law Judge was informed of the fact that Plaintiff was under medication, and that Plaintiff was experiencing pain. Furthermore, the Administrative Law Judge was fully apprised of the Plaintiff's medical condition through the medical records. Further evidence as to Plaintiff's medical condition and subjective pain, even if developed in greater detail would still be cumulative in relation to the

evidence previously considered by the Secretary. Mere cumulative evidence is not a sufficient basis to justify remand, Bradley v. Califano, 573 F.2d 28 (Tenth Cir. 1978); Locklear v. Mathews, 424 F.Supp. 639 (D.Md. 1976); Schall v. Gardner, 308 F.Supp. 1125 (D.S.D. 1970); Morris v. Finch, 319 F.Supp 818 (S.D.W.Va. 1969), and neither is the mere fact that Plaintiff was not represented by counsel at the administrative hearing, a fact recognized by Plaintiff. Heisner v. Secretary of Health, Education and Welfare, 538 F.2d 1329 (Eighth Cir. 1976); Green v. Weinberger, 500 F.2d 203 (Fifth Cir. 1974); Wilson v. Califano, 453 F.Supp. 79 (N.D.Tex. 1978); Ihnen v. Celebrezze, 223 F.Supp. 157 (D.S.D. 1963); Butler v. Folsom, 167 F.Supp. 684 (W.D.Ark. 1958). Therefore, the Court finds and concludes that Plaintiff's alternative Motion to Remand should be overruled.

It is so Ordered this 30 day of May, 1979.

Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LUMBERMENS MUTUAL CASUALTY COMPANY,

Plaintiff,

v.

JAMES S. HOAGLAND and HARRY J. HOAGLAND,

Defendants & Third Party Plaintiffs,

v.

PAUL E. NEELY d/b/a NEELY INSURANCE AGENCY

Third Party Defendant.

No. 78-C-558-C

ORDER

The plaintiff herein seeks a declaration of its non-liability to the defendants, its insureds under a builder's risk insurance policy. The defendants have filed a counterclaim against the plaintiff. In their First Cause of Action, defendants allege that they are entitled to the proceeds of the insurance policy, and should it be adjudged that they are not entitled to those proceeds under the written policy, the contract of insurance should be reformed according to oral representations made by plaintiff's agent, thereby allowing their recovery from the plaintiff of the proceeds of the insurance policy. In their Second Cause of Action, the defendants allege that the plaintiff has arbitrarily, capriciously, and willfully refused to pay the proceeds of the insurance policy, for which the defendants seek an award of actual and punitive damages. The third-party defendant, Paul E. Neely, is the plaintiff's agent and issued the subject insurance policy. Now before the Court are the plaintiff and the defendants' cross-motions for summary judgment on the plaintiff's Complaint and the defendants' counterclaim.

In June of 1977, the defendants were the owners of a vacant building and surrounding property, located at Fifth and North Lynn

Riggs in Claremore, Oklahoma (Warehouse Market property). The defendants intended to convert the Warehouse Market property into a shopping center. They planned to renovate the existing building for a major tenant and then add on smaller shops behind it.

Having dealt with Mr. Paul E. Neely in the past on insurance matters, the defendant James S. Hoagland contacted Mr. Neely on June 30, 1977 in regard to insuring the Warehouse Market property. Mr. Hoagland asked for "full coverage", and told Mr. Neely that he and the defendant Harry J. Hoagland planned to remodel the building into a shopping center. By "full coverage" Mr. Hoagland meant that he wanted insurance to cover any contingency that might arise on the property. That same day, Mr. Neely issued a binder on the building. A builder's risk policy effective June 30, 1977 was subsequently issued by the plaintiff through Mr. Neely as its agent.

In February of 1978, the building was leased for use as a warehouse for shoes and boots. On May 11, 1978, there was a fire in the building. Defendants filed a claim for the fire loss with the plaintiff. Plaintiff claims that it is not liable for the loss because defendants permitted the building to be occupied during the policy term, thereby voiding the policy, irrespective of the cause of the loss, and further because the occupation of the building, the warehousing of goods, and the connection of electricity to the building increased the hazard of loss thereby voiding the insurance coverage.

In their Motion, the defendants contend first of all that the occupancy clause relied upon by the plaintiff is void because it is in conflict with the standard fire insurance provisions prescribed by Oklahoma statute.

Title 36 O.S. § 4803 provides in pertinent part as follows:

> "A. The printed form of a policy of fire insurance as set forth in subsection F shall be known and designated as the standard fire insurance policy to be used in the State of Oklahoma.

> B. No policy or contract of fire insurance shall be made, issued or delivered by any insurer or by any agent or representative thereof, on any property in the state, unless it shall conform as to all provisions, stipulations, agreements and conditions, with such form of policy."

Section 4803 authorizes certain permissible variations in the standard policy, none of which are applicable here.

The Standard Fire Insurance Policy set forth in Section 4803(f) provides in pertinent part as follows:

> Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring . . .
>
> (b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days; . . .

The occupancy clause in plaintiff's builder's risk policy requires non-occupancy of the building as a condition of the insurance.

> "It is a condition of the insurance under Item I that the said building or structure shall not be occupied without obtaining the consent of this Company endorsed hereon with proper rate adjustment; . . ."

The Court sees no conflict between these clauses. The standard fire policy clause specifically provides that it is subject to modification. The builder's risk occupancy clause is a permissible modification.

The defendants argue that the only permissible modifications would be those that broaden coverage, rather than narrowing it. Considering the facts which gave rise to this lawsuit, the builder's risk occupancy clause could very well have the effect of limiting the coverage. However, in regard to the present issue, the Court is only concerned with the written terms of the policy. On its face, the occupancy clause of the builder's risk policy does not narrow defendants' coverage. It simply substitutues one occupancy condition for another. Following the defendants' line of reasoning, had the subject premises been unoccupied for more than sixty days at the time of the loss, the builder's risk policy would have provided more coverage than the standard fire policy. The change here affected the type of coverage, not the quantity of coverage.

The foregoing conclusions also dispose of another contention raised by the defendants. The Standard Fire Insurance Policy required by Section 4803 is incorporated into the builder's risk policy issued by the plaintiff. The defendants contend that the two different provisions on occupancy create an ambiguity that must be construed against the insurer. For the reasons enumerated above, the Court must hold that there is no ambiguity in the insurance contract that would require the application of that rule of construction.

The defendants contend that they are entitled to have the contract of insurance reformed because the defendant James S. Hoagland told Mr. Neely that the defendants wanted "full coverage", meaning covering all contingencies, and the insurance that was issued only covered the building "while in course of construction." The defendants allege that such insurance was issued by the plaintiff through its agent Mr. Neely, despite Mr. Neely's knowledge that the building was already in existence and not under construction. The defendants further allege that Mr. James S. Hoagland was completely unfamiliar with the terms of a builder's risk insurance policy, and such terms were never explained to him by Mr. Neely. The Defendants have submitted Mr. Hoagland's affidavit to that effect.

A contract of insurance can be reformed to conform to the true intention of the parties where there has been a mutual mistake as to a material fact. See Warner v. Continental Casualty Co., 534 P.2d 695 (Okla. 1975); United States Fidelity & Guaranty Co. v. Webb, 477 P.2d 392 (Okla. 1970); Commercial Casualty Ins. Co. v. Varner, 160 Okla. 141, 16 P.2d 118 (1932). Where an insurance policy does not represent the true intention of the parties because of the fault or negligence of the agent writing the policy, the policy can be reformed to reflect the intended contract. See Warner v. Continental Casualty Co., supra; Security Insurance Co. v. Deal, 175 Okla. 450, 53 P.2d 271 (1936). In other words,

> "[w]here an agreement has been reached by the parties as to the terms of a contract, but either through mutual mistake

> of the parties, or through mistake upon the part of one and fraud or inequitable conduct on the part of the other, the written instrument drafted to evidence the contract fails to express the real agreement and intention of the parties, equity may grant reformation." Hayes v. Traveler's Insurance Co., 93 F.2d 568, 570 (10th Cir. 1937). See also Kelly-Dempsey & Co. v. Century Indemnity Co., 77 F.2d 85 (10th Cir. 1935).

In Oklahoma, there can be no reformation of a contract unless there is an antecedent agreement, and the proof of such agreement "must be sufficient to take the question out of the range of reasonable controversy because the court cannot make a new or different contract for the parties." Agee v. Traveler's Indemnity Co., 396 F.2d 57, 59 (10th Cir. 1968).

Mr. Hoagland informed Mr. Neely that he wanted "full coverage" insurance on a building that he was intending to renovate. Mr. Neely issued the appropriate type of policy. Mr. Neely's depositon testimony establishes that builder's risk policies are often issued by his agency on existing buildings undergoing renovation. This is confirmed by the deposition of Jacque Rumbaugh Brown, who handles commercial property insurance for the Neely Insurance Agency. Furthermore, the plaintiff admits that the policy would have covered the building even though the renovations were never begun. So the fact that the building was already in existence does not establish a mistake or negligence on the part of Mr. Neely.

The defendants were also fully covered by the policy. All contingencies anticipated by the parties at the time of contracting were covered. It is clear that at the time the contract of insurance was entered into, neither the defendants nor Mr. Neely anticipated the February, 1978 lease of the building. Mr. Neely was never informed of the lease. Mr. Neely testified that he was aware that the renovation was not proceeding. However, he was never informed of any change in the defendants' plans for the building.

The defendants got the type of insurance policy that they bargained for. The defendants have not proved a different antecedent agreement which would compel rectification of the policy. At the

most, there may have been a unilateral mistake on the part of Mr. James Hoagland as to the terms of the policy. However, there was no mistake, or negligence, or fraud on the part of Mr. Neely which would justify reformation.

The plaintiff's Motion, as well as the defendants' Motion, bring into question the application of the policy exclusions which are the subject of plaintiff's Complaint. In regard to those exclusions, the Court is satisfied that the building was "occupied" thereby terminating the insurance coverage under the subject policy. It is therefore unnecessary for the Court to deal with the exclusion relating to an increase in the insured risk.

In Reliance Ins. Co. v. Jones, 296 F.2d 71 (10th Cir. 1961), the Court had occasion to construe a similar occupancy clause in a builder's risk insurance policy. The court there held that

> "[t]he word 'occupied' must be considered not in a technical but in a popular sense, and must have a reasonable and practical construction. Words or terms in an insurance policy are to be construed according to their plain, ordinary, and accepted sense in the common speech of men unless it affirmatively appears from the policy that a different meaning was intended . . . . Construed with reference to the species of property insured and the use contemplated for this particular type of property it cannot be said that the building was occupied. . . . A building is occupied when it is put to a practical and substantial use for the purpose for which it was designed . . . ." (Citations omitted.)
> 296 F.2d at pp. 73-4.

Based upon this definition, the court concluded that the temporary storage of a small amount of grain in an uncompleted grain elevator was not occupancy.

In the instant case, common sense dictates that the storage of several thousand shoes and boots in defendants' building amounted to occupancy of the building. The defendants contend that the building was not "occupied" under the Reliance definition because it was not being used for the purpose intended, i.e. a retail store. This is a very strained reading of Reliance. The Reliance definition continues on to say that a building is "occupied" if it is being used

for the purpose for which it was designed. The design of the defendants' building would enable it to be used for many purposes. Storage is certainly one of those purposes. Furthermore, the storage of the boots and shoes was a substantial use of the building, and was practical in the sense that the defendants received substantial rental from their lessee. Failure to comply with the condition of non-occupancy terminates the insured risk. See Hendrix v. New Amsterdam Casualty Co., 390 F.2d 299 (10th Cir. 1968).

In light of the foregoing, the plaintiff is entitled to a judgment on its Complaint and the First Cause of Action of defendants' Counterclaim. As to the defendants' Second Cause of Action, the holding of the Court that the plaintiff is not liable to the defendants under the builder's risk policy necessarily leads to the conclusion that the plaintiff's failure to pay under the policy was not arbitrary, capricious, or willful. The plaintiff is therefore entitled to a judgment on the Second Cause of Action of defendants' Counterclaim as well.

For the foregoing reasons, it is therefore ordered that the plaintiff's Motion for Summary Judgment is hereby sustained, and the defendants' Motion for Summary Judgment is hereby overruled.

Dated this 29th day of May, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IN RE:

LARRY WAYNE HANKS,

Bankrupt,

ELDER PAINT AND WALLPAPER CO., an Oklahoma Corporation,

Plaintiff-Appellant,

v.

LARRY WAYNE HANKS,

Defendant-Appellee.

No. 79-C-26-C

ORDER

This is an appeal from the judgment of the bankruptcy court entered on November 29, 1978 in Bankruptcy No. 76-B-1206, ordering that the plaintiff/appellant take nothing and dismissing that proceeding on the merits, and further ordering that the debt which was the subject of the plaintiff's/appellant's complaint was dischargeable in bankruptcy and discharging that debt.

The appellant raises the same questions on appeal that it raised before the bankruptcy court. It contends that the appellee breached the fiduciary duty imposed by 42 O.S. §§ 152, 153, thereby rendering his debt to the appellant nondischargeable under § 17c(4) of the Bankruptcy Act, which provides that "a discharge in bankruptcy shall release a bankrupt from all of his proveable debts . . . except such as . . . were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity."

Title 42 O.S. § 152 imposes a trust on funds received by contractors or subcontractors on building or remodeling contracts for payment of all lienable claims due and owing by such persons by reason of those contracts. Section 153 requires that such trust funds be applied to the payment of the lienable claims and not used for any other purpose until all lienable claims have been paid.

The facts were stipulated to by the parties. The bankruptcy judge concluded that Sections 152 and 153 were not applicable to the stipulated facts, and that such facts did not otherwise establish a fiduciary relationship between the parties recognizable under Section 17c(4) of the Bankruptcy Act.

The Court has made an independent examination of the law relied upon by the bankruptcy judge and has determined that his conclusions are correct. The Court therefore adopts the Findings of Fact and Conclusions of Law entered in the bankruptcy court, and the judgment entered in accordance therewith is hereby affirmed.

Dated this 29th day of May, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DONALD K. McANALLY,)
)
Plaintiff,)
)
vs.) CIVIL ACTION NO. 78-C-347-C
)
JOSEPH A. CALIFANO, JR.,)
Secretary of Health,)
Education and Welfare,)
)
Defendant.)

JUDGMENT

This matter comes on for consideration of the Findings and Recommendations of the Magistrate. For the reasons stated herein, the Court finds that the Findings and Recommendations of the Magistrate should be accepted and affirmed.

Plaintiff in this action has petitioned the Court to review a final decision of the Secretary of the Department of Health, Education and Welfare denying him disability benefits provided for in Sections 216 and 223 of the Social Security Act, as amended, 42 U.S.C. §§416, 423. He asks that the Court reverse this decision and award him the additional benefits he seeks.

The matter was first heard by an Administrative Law Judge of the Bureau of Hearings and Appeals of the Social Security Administration, whose written decision was issued on February 27, 1978. The Administrative Law Judge found that Plaintiff was not entitled to disability benefits under Sections 216 and 223 of the Social Security Act, as amended. Thereafter, that decision was appealed to the Appeals Council of the Bureau of Hearings and Appeals, which Council on May 31, 1978, issued its findings that the decision of the Administrative Law Judge was correct and that further action by the Council would not result in any change which would benefit the Plaintiff. Thus, the decision of the Administrative Law Judge became the final decision of the Secretary of the Department of Health, Education and Welfare.

Plaintiff contends that the Secretary's decision that Plaintiff's disability ceased in November, 1976, is incorrect. Plaintiff maintains that he continued to be disabled past the time of cessation found by the Secretary.

Plaintiff's claimed disability is from his respiratory problems, a weight loss, an ulcer, and arthritis. The record reveals that Plaintiff's condition did disable him from January, 1975, to November, 1976, but not thereafter. The medical evidence supporting the Secretary's decision terminating Plaintiff's benefits consisted of the objective evidence contained in a November 16, 1976, report from Dr. Donald Collins. Dr. Collins reported that Plaintiff's respiratory condition was only mild to moderate; that Plaintiff was still smoking; that Plaintiff's arthritis was not significant and was consistent with his age; that Plaintiff's weight was up to 175 pounds; that there was no evidence of liver disease; and that the doctor could find nothing to prevent Plaintiff's working. See pages 183 to 189 of the administrative transcript.

The record also includes short reports from three physicians, who offered their opinions that Plaintiff could not work. See pages 190, 191 and 195 of the administrative transcript. The Administrative Law Judge carefully considered those opinions in reaching his decision denying Plaintiff's claim. See pages 10-12 of the transcript.

The record indicates Plaintiff was only 44 years old when the Secretary determined Plaintiff could return to his former work in November, 1976. He has a third grade education and has worked as a welder, common laborer and janitor. In fact, Plaintiff's own hearing testimony indicated that since at least the summer of 1977, he had been working as a night janitor. See pages 30-33 of the administrative record.

Judicial review of the Secretary's denial of Social Security Disability Benefits is limited to a consideration of the pleadings and the transcript filed by the Secretary as required by 42 U.S.C. § 4059g), and is not a trial de novo.

Atteberry v. Finch, 424 F.2d 36 (10th Cir. 1970); Hobby v. Hodges, 215 F.2d 754 (10th Cir. 1954). The findings of the Secretary and the inferences to be drawn therefrom are not to be disturbed by the Courts if there is substantial evidence to support them. 42 U.S.C. § 405(g); Atteberry v. Finch, supra.

Substantial evidence has been defined as:

> "'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Richardson v. Perales, 402 U.S. 389, 401, citing Consolidated Edison Company v. NLRB, 305 U.S. 197, 229 (1938)

It must be based on the record as a whole. See Glasgow v. Weinberger, 405 F. Supp. 406, 408 (E.D. Cal. 1975). In National Labor Relations Board v. Columbian Enameling & Stamping Company, 306 U.S. 292, 300 (1939), the Court, interpreting what constitutes substantial evidence, stated:

> "It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Cited in Atteberry v. Finch, supra; Gardner v. Bishop, 362 F.2d 917 (10th Cir. 1966). See also Haley v. Celebrezze, 351 F.2d 516 (10th Cir. 1965); Folsom v. O'Neal, 250 F.2d 946 (10th Cir. 1957). However, even though the findings of the Secretary are supported by substantial evidence, a reviewing court may set aside the decision if it was not reached pursuant to the correct legal standards. See Knox v. Finch, 427 F.2d 919 (5th Cir. 1970); Flake v. Gardner , 399 F.2d 532 (9th Cir. 1968); Branham v. Gardner, 383 F.2d 614 (6th Cir. 1967); Garrett v. Richardson, 363 F. Supp. 83 (D.S.C. 1973).

After carefully reviewing the entire administrative record, the pleadings, and the briefs and arguments of counsel, the Court finds that the Administrative Law Judge applied the correct legal standards in making his findings on Plaintiff's claim for disability insurance benefits. The Court further finds that the record contains substantial evidence to support his findings.

An individual claiming disability insurance benefits under the Act has the burden of proving the disability. Valentine v. Richardson, 468 F.2d 588 (10th Cir. 1972). Plaintiff must meet two criteria under the Act:

1. That the physical impairment has lasted at least twelve months that prevents his engaging in substantial gainful activity; and

2. That he is unable to perform or engage in any substantial gainful activity. 42 U.S.C. § 423; Alexander v. Richardson, 451 F.2d 1185 (10th Cir. 1971), cert. denied, 407 U.S. 911 (1972); Timmerman v. Weinberger, 510 F.2d 439 (8th Cir. 1975). The burden is not on the Secretary to make an initial showing on nondisability. Reyes Robles v. Finch, 409 F.2d 84 (10th Cir. 1969). In addition, a claimant has the burden of proving that his disability continued past the time of cessation found by the Secretary. Alvarado v. Weinberger, 511 F.2d 1046 (1st Cir. 1975); Myers v. Richardson, 471 F.2d 1265 (6th Cir. 1972); McCarty v. Richardson, 459 F.2d 3 (5th Cir. 1972).

The Secretary's regulations vest discretion in the Administrative Law Judge to weigh physicians' conclusory opinions. 20 C.F.R. § 404.1526; Trujillo v. Richardson, 429 F.2d 1149 (10th Cir. 1970). As trier of facts, it is the Secretary's responsibility to consider all the evidence, to resolve any conflicts in the evidence, and to decide the ultimate disability issue. Richardson v. Perales, 402 U.S. 389 (1971); Mayhue v. Gardner, 294 F. Supp. 853 (D. Kan. 1968), aff'd, 416 F.2d 1257 (10th Cir. 1969).

The Secretary found that the evidence as a whole demonstrated that by November, 1976, Plaintiff regained his capacity to perform his former work, including the work he was currently performing as a janitor at the time of the administrative hearing. A Plaintiff is not disabled if he can do his former work, and even part-time employment may indicate the ability to engage in substantial gainful activity. Trujillo v. Richardson, 429 F.2d 1149 (10th Cir. 1970); Gray v. Weinberger, 397 F. Supp. 304 (W.D.

Va. 1975); Everitt v. Weinberger, 399 F. Supp. 35 (D. Kan. 1975). See also Price v. Richardson, 443 F.2d 347 (5th Cir. 1971).

Because the findings of the Administrative Law Judge are supported by substantial evidence and because said findings are based upon the correct legal standards, it is the determination of the Court that the Plaintiff is in fact not entitled to continued disability benefits under the Social Security Act. Judgment is so entered on behalf of the Defendant.

It is so Ordered this 29th day of May, 1979.

H. Dale Cook

H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. EDWARD M. VALENCIA and JUDY L. VALENCIA, a/k/a, JUDY VALENCIA, husband and wife; JAMES DYE and KERETIA DYE, husband and wife; and TULSA ADJUSTMENT BUREAU, INCORPORATED, Defendants.	)	CIVIL ACTION NO. 79-C-20-C

FILED

MAY 29 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 29th day of May, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney; and the Defendants, Tulsa Adjustment Bureau, Incorporated, appearing by its attorney, D. William Jacobus, Jr., and Edward M. Valencia, Judy L. Valencia, James Dye and Keretia Dye, appearing not.

The Court being fully advised and having examined the file herein finds that Defendants, Edward M. Valencia and Judy L. Valencia, were served by publication as shown on Proof of Publication filed herein; that Defendants James Dye and Keretia Dye were served with Summons and Complaint on January 25, 1979; and that Defendant, Tulsa Adjustment Bureau, Incorporated was served with Summons and Complaint on January 10, 1979.

It appearing that the Defendant, Tulsa Adjustment Bureau, Incorporated has filed a Disclaimer on January 12, 1979; and that Defendants Edward M. Valencia, Judy L. Valencia, Keretia Dye and James Dye have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Twenty (20), Block Four (4), VALLEY VIEW ACRES ADDITION to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded Plat thereof.

THAT the Defendants, Edward M. Valencia and Judy L. Valencia, did, on the 25th day of June, 1976, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of $9,250.00 with 9 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Edward M. Valencia and Judy L. Valencia, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of $9,259.09 as unpaid principal with interest thereon at the rate of 9 percent per annum from September 1, 1978, until paid, plus the cost of this action accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Edward M. Valencia and Judy L. Valencia, in rem, for the sum of $9,259.09 with interest thereon at the rate of 9 percent per annum from September 1, 1978, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment, in rem, against Defendants, James Dye and Keretia Dye.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment.

The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the Complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof.

/s/ W. Dale Cook
UNITED STATES DISTRICT JUDGE

APPROVED

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IN THE MATTER OF:
THE PHILLIPS PETROLEUM CO.)
AND INTERNAL REVENUE)
SERVICE FILES)
Plaintiff

vs.

)
)
)
Defendant

Civil Action

No. 78-C-219-C ✓

FILED

MAY 29 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

Phillips Petroleum Company, having withdrawn its objection thereto by stipulation dated May 14, 1979, it is ordered that access to the files of the United States Justice Department and Internal Revenue Service now held by the United States Marshal under lock and seal, pursuant to order of then Chief Judge Allen E. Barrow, Misc. No. 128, filed May 24, 1978, be permitted to authorized representatives of the Department of Justice, the Internal Revenue Service and Phillips Petroleum Company in order to return to Internal Revenue Service all material which was in the possession of Internal Revenue Service prior to commencement of September Term 1975 grand jury proceedings in Phillips Petroleum Company matters, such material to be used for the sole purpose of determining the liability of Phillips Petroleum Company for taxes and civil penalties, if any, for the year 1970 and subsequent years.

Access is to commence on May 30, 1979.

Dated: Tulsa, Oklahoma
May , 1979

H. DALE COOK
Chief Judge, United States
District Court

No objection
Phillips Petroleum Company
By

19

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

United States of America, Plaintiff, vs. 1.13 Acres of Land, More or Less, Situate in Washington County, State of Oklahoma, and John R. Smith, et al., and Unknown Owners, Defendants.	)	CIVIL ACTION NO. 78-C-6-C Tract No. 422 (Included in D.T. Filed in Master File #400-10)

J U D G M E N T

1.

Now, on this 29 day of May, 1979, this matter comes on for disposition on application of the Plaintiff, United States of America, for entry of judgment on a stipulation of the parties agreeing upon just compensation, and the Court, after having examined the files in this action and being advised by counsel for Plaintiff, finds:

2.

This judgment applies to the entire estate condemned in Tract No. 422, as such estate and tract are described in the Complaint filed in this action.

3.

The Court has jurisdiction of the parties and subject matter of this action.

4.

Service of Process has been perfected either personally or by publication notice, as provided by Rule 71A of the Federal Rules of Civil Procedure, on all parties defendant in this cause who are interested in subject tract.

5.

The Acts of Congress set out in paragraph 2 of the Complaint filed herein give the United States of America the right, power and authority to condemn for public use the property described in such Complaint. Pursuant thereto, on January 5, 1978,

the United States of America filed its Declaration of Taking of such described property, and title to the described estate in such property should be vested in the United States of America as of the date of filing the Declaration of Taking.

6.

Simultaneously with filing the Declaration of Taking, there was deposited in the Registry of this Court, as estimated compensation for the taking of subject property a certain sum of money, and all of this deposit has been disbursed, as set out below in paragraph 14.

7.

The defendant named in paragraph 14 as owner of the estate taken in subject tract is the only defendant asserting ownership of such property. All other defendants having either disclaimed or defaulted, the named defendant, as of the date of taking, was the owner, and, as such, is entitled to receive the just compensation awarded by this judgment.

8.

On May 25, 1979, a Stipulation, executed by the former owner of the estate taken in subject tract, and the United States of America, was filed herein, whereby all improvements situated upon the subject tract on the date of taking herein, were excluded from the taking and title thereto was revested in the former owner. Such exclusion of property should be approved by the Court.

9.

The Stipulation described in paragraph 8 above also contained a stipulation as to the amount of just compensation for the estate condemned in the subject tract, and such stipulation should be approved by the Court.

10.

This judgment will create a deficiency between the amount deposited as estimated compensation for the estate taken in subject tract and the amount fixed by the Stipulation As To Just Compensation, and the amount of such deficiency should be deposited for the benefit of the owner. Such deficiency is set out in paragraph 14 below.

11.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power and authority to condemn for public use the tract designated as Tract No. 422, as such tract is particularly described in the Complaint filed herein; and such tract, to the extent of the estate described in such Complaint (but subject to the exclusion provided below in paragraph 13) was condemned, and title thereto vested in the United States of America as of January 5, 1978, and all defendants herein and all other persons interested in such estate are forever barred from asserting any claim (except as to such excluded property) to such estate.

12.

It Is Further ORDERED, ADJUDGED and DECREED that on the date of taking, the owner of the estate condemned herein in subject tract was the party whose name appears below in paragraph 14, and the right to receive the just compensation awarded by this judgment is vested in the party so named.

13.

It Is Further ORDERED, ADJUDGED and DECREED that the agreement of the former owner and the Plaintiff, regarding exclusion of certain property from the taking in this case, as set forth in the Stipulation (described in paragraph 8 above) filed herein on May 25, 1979 hereby is approved.

14.

It Is Further ORDERED, ADJUDGED and DECREED that the agreement as to just compensation, described in paragraph 9 above, hereby is approved and the amount therein fixed by the parties is adopted by the Court as the award of just compensation for the estate taken in the subject tract in this case, as shown in the schedule which follows, to-wit:

TRACT NO. 422

OWNER: John R. Smith

Award of just compensation pursuant to Stipulation --------	$65,000.00	$65,000.00
Deposited as estimated compensation ----------	$46,125.00	
Disbursed to owner ----------		46,125.00
Balance due to owner ----------		$18,875.00
Deposit deficiency ----------	$18,875.00	

15.

It Is Further ORDERED, ADJUDGED and DECREED that the United States of America shall deposit in the Registry of this Court in this civil action, to the credit of subject tract, the deposit deficiency in the sum of $18,875.00, and the Clerk of this Court then shall disburse the deposit for such tract as follows:

To - John R. Smith ---------- $18,875.00.

UNITED STATES DISTRICT JUDGE

APPROVED:

HUBERT A. MARLOW
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IN RE:

ERNEST PAUL ATKINSON and
LOIS FANNIE ATKINSON,

Bankrupts,

GARDEN TRAILS RESTAURANT,
a Partnership, and
KHALED RAHHAL, an Individual
and a Partner,

Plaintiff-Appellants

v.

RALPH GRABEL, Trustee in Bankruptcy
of Estate of Bankrupts, Ernest P.
Atkinson and Lois F. Atkinson,

Defendants-Appellees,

ERNEST P. ATKINSON and
LOIS F. ATKINSON, Husband and Wife,

Defendants-Appellants,

GERALD S. RICHARDS and CHARLOTTE
RICHARDS, Husband and Wife,

Defendants-Appellants.

No. 78-C-179-D

ORDER

The Court has for consideration the Appeal from the judgment of the Bankruptcy Court in Bankruptcy Case No. 77-B-838, dismissing the Complaint of the plaintiffs, Garden Trails Restaurant and Khaled Rahhal (collectively referred to as "Rahhal") against Ralph Grabel, Trustee in Bankrutpcy ("Trustee") and Gerald S. Richards and Charlotte Richards, husband and wife ("Richards").

This appeal raises the issue of whether the Bankruptcy Court was correct in finding that the Court had no jurisdiction of the claim by the plaintiff against the Richards and whether the Bankruptcy Court was correct in finding that the Trustee was not a proper party to the action.

This case was brought as an adversary proceeding in the above referenced bankruptcy case by Rahhal seeking damages for fraud and misrepresentation against Richards and Atkinsons, and seeking to

establish that certain debts owed the partnership by the Atkinsons are non-dischargeable under Section 17 of the Bankruptcy Act.

Rahhal's Complaint is based on the following allegations centering around the lease and sublease of property known as the Garden Trails Building and the Lath House, all located at 2430 East 91st Street, Tulsa, Oklahoma, and owned by the Richards. In December, 1976, the property was being operated by the Garden Trails Restaurant. The Richards had previously leased the property to the Atkinsons. On or about December 15, 1976, Rahhal entered into a sublease agreement with the Atkinsons for the purpose of operating a restaurant. In addition, Rahhal leased certain furniture, fixtures and equipment from the Atkinsons which is the subject of a claim against Rahhal by the Trustee in the amount of $19,000.

Rahhal alleges that under the Sublease Agreement, Rahhal and his partner Saad Taha, paid $2,520.76 which sum included $820.76 which was to be applied toward insurance premiums to cover the leased property. According to the Complaint, the Richards and the Atkinsons represented to Rahhal that the $820.76 "would be applied to the purchase of full and complete insurance on the real property", including improvements, contents, equipment and personal property. It is further alleged that insurance was not provided on the personal property "due to the fault, neglect or fraud of" the Atkinsons and Richards.

The buildings and their contents were damaged by fire on December 20, 1976. Included in the contents which were damaged was the leased equipment and property owned by Rahhal alleged to have a value of $8,579.

Rahhal alleges that after the fire, Richards and the Atkinsons represented that the building would be reconstructed; that the rent would be abated until such time as the building was reconstructed; that amounts already paid by Rahhal would be applied in the future; that Richards settled with the insurance carrier for the loss without notice to Rahhal and that Richards and the Atkinsons did not honor their representations outlined above.

The claim against Richards and Atkinsons alleges the same facts against both parties and seeks judgment against each jointly and severally.

The Bankruptcy Court retained jurisdiction over the claim stated by Rahhal against the Atkinsons, but dismissed the Richards and the Trustee.

Appellants contend that the Court's jurisdiction under Section 17 of the Bankruptcy Act (11 U.S.C. §35) is not limited to the determination of the dischargeability of a debt. Appellants argue that Rule 409(b), Rules of Bankruptcy Procedure, which implements Section 17, and Rule 720, Rules of Bankruptcy Procedure, contemplate the joinder of all issues arising out of the claim which is sought to be declared non-dischargeable. In support of their argument they cite 1A Collier on Bankruptcy, ¶17.28A[4] at Page 1742.4, where it is stated:

> This provision in Section 17c(3) renders unnecessary a splitting of actions or two lawsuits, which was a criticism directed to prior versions of legislation attempting to give jurisdiction to the Bankruptcy Courts to determine the dischargeability of debts. The whole "ball of wax" shall now be handled in the Bankruptcy Court, upon complaint filed pursuant to Bankruptcy Rule 409(a).

In addition, Appellants claim that Rule 270 makes Rule 20 of the Federal Rules of Civil Procedure applicable to adversary proceedings. Rule 20(a) provides:

> All persons my join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrences, and if any question of law or fact, common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective right to relief, and against one or more defendants according to their respective liabilities.

Rahhal has asserted in the complaint a claim against the Richards and Atkinsons jointly and severally, and the claims arise out of the same alleged transactions. The same questions of law and fact are common to all defendants, at least insofar as the claim for damages is concerned. Appellants further argue that any right which defendants, Richards, had to demand that these issues be tried in a plenary action, have been waived by the Richards.

As to the Trustee, the Bankruptcy Court found that the Trustee "is not a necessary or proper party to this proceeding and the Complaint fails to state a claim for relief as to such defendant." The Trustee has no interest in Rahhal's claim that certain debts are non-dischargeable. Appellants claim that to the extent that Rahhal's claim is a claim against the debtor estate, the Trustee is a proper party; that the debtor has listed a claim against Rahhal, arising out of the same transaction, as an asset of the estate; and that the Atkinsons have listed Rahhal in the Petition in Bankruptcy as having a disputed claim against them. Appellants further argue that these issues arise out of the same transactions (i.e., the lease of the property and destruction by fire) as alleged in Rahhal's claim against the Atkinsons and Richards, and that it would be appropriate to adjudicate all the issues in the same action. All parties to this appeal agree that the decision of the Bankruptcy Court should be reversed.

The Bankruptcy Judge did not enter a formal written opinion at the time of ruling upon the Motions to Dismiss. By an Order filed November 15, 1978, this Court remanded this matter to the Bankruptcy Court for the purpose of entering Findings of Fact and Conclusions of Law. These were filed in this matter on January 9, 1979.

The Court has reviewed the record in connection with this appeal, the Findings of Fact and Conclusions of Law of the Bankruptcy Judge, the Findings and Recommendations of the Magistrate,

and the relevant authorities and is of the opinion that the decision of the Bankruptcy Court should be affirmed in part.

The fact that all the parties to this appeal argue that the Bankruptcy Court has jurisdiction over the claims asserted against Richards is of no consequence. It is of course axiomatic that the federal courts, including bankruptcy courts, are courts of limited jurisdiction. Aldinger v. Howard, 427 U.S. 1 (1976); First State Bank v. Sand Springs State Bank, 528 F.2d 350 (Tenth Cir. 1976). The power of bankruptcy courts to act must be found either expressly or impliedly in the Bankruptcy Act. In re J.M. Wells, Inc., 575 F.2d 329 (First Cir. 1978); First State Bank v. Sand Springs State Bank, supra; Ruhter v. Internal Revenue Service, 339 F.2d 575 (Tenth Cir. 1964); O'Dell v. United States, 326 F.2d 451 (Tenth Cir. 1964). It is, of course, fundamental that the parties cannot by their consent expand the subject matter jurisdiction of the federal courts. People's Bank v. Calhoun, 102 U.S. 256 (1880); American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951); First State Bank v. Sand Springs State Bank, supra; In re Martinez, 241 F.2d 345 (Tenth Cir. 1957); Central States Corp. v. Luther, 215 F.2d 38 (Tenth Cir. 1954), cert. denied 348 U.S. 951 (1955).

The jurisdiction of the Bankruptcy Court, though limited, extends to those matters which must be decided in order to effectuate the administration of the bankrupt's estate. First State Bank v. Sand Springs State Bank, supra; O'Dell v. United States, supra; Reconstruction Finance Corp. v. Riverview State Bank, 217 F.2d 455 (Tenth Cir. 1954); Central States Corp. v. Luther, supra.

In First State Bank v. Sand Springs State Bank, supra, the court was presented with a controversy between two banks asserting conflicting claims to funds represented by certificates of deposit held by Gulfco Corporation. This controversy arose during the course of Gulfco's reorganization proceedings under Chapter X of the Bankruptcy Act. The court concluded that the dispute over the certificates was best resolved in state court, and reversed the decision of the bankruptcy court, as having been an improper

exercise of jurisdiction. In examining the extent of the bankruptcy court's jurisdiction, the court said:

> A court of bankruptcy cannot entertain jurisdiction of a private controversy which does not relate to matters pertaining to bankruptcy. . . . In the same vein, a bankruptcy court lacks jurisdiction of a controversy solely and exclusively between third parties which does not involve, directly or indirectly, the bankrupt or its property. . . . Furthermore, a bankruptcy court ordinarily lacks jurisdiction of a controversy between parties over a matter in which the trustee asserts no interest. . . .
>
> Courts have, however, recognized this exception to the above rules: That a court of bankruptcy does have jurisdiction to determine a dispute between third parties concerning the ownership of property if it is impossible to administer completely the estate of the bankrupt without determining the controversy. . . .

528 F.2d at 353 (citations omitted).

There is no doubt that the claims asserted against Richards rest with those against the bankrupts upon common facts. It may well be that it would be convenient to dispose of these matters in one proceeding. Common facts and convenience, however, are not the bases upon which jurisdiction rests. As was the case in First State Bank v. Sand Springs State Bank, supra, the resolution of Rahhal's dispute with Richards will not directly or indirectly affect the bankrupts. There is no showing that the resolution of this dispute is necessary for the complete administration of the estate of the bankrupts. As the Bankruptcy Judge has said, this "is a matter which is simply not the business of [the] bankruptcy court."

The Order of the Bankruptcy Court dismissing Gerald S. Richards and Charlotte Richards should accordingly be affirmed.

The Trustee in bankruptcy was dismissed upon the finding by the Bankruptcy Court that he was neither a necessary nor a proper party, to the proceeding concerning the bankrupts' discharge. Subject matter jurisdiction exists under §2 of the Bankruptcy Act to determine all questions which may be raised between

the estate and the Plaintiffs. 11 U.S.C. §11. In his Findings and Conclusions, the Bankruptcy Judge has stated:

> Strictly speaking, the trustee is not a necessary or proper party to the dischargeability complaint and the only relief that plaintiffs could possibly be accorded as against the trustee would be creditors' claims against the estate. But, as stated, this court does have jurisdiction to render judgment on all issues which might exist between plaintiffs and the estate and if plaintiffs consent to the exercise of that jurisdiction, as they have to date, so be it.

To whatever extent Plaintiff's claim is a claim against the estate, the Trustee is a proper party, and the ruling of the Bankruptcy Court as to the dismissal of the Trustee should be reversed.

IT IS THEREFORE ORDERED that the decision of the Bankruptcy Court be and is hereby affirmed insofar as it relates to the dismissal of Defendants Gerald S. Richards and Charlotte Richards.

IT IS FURTHER ORDERED that the decision of the Bankruptcy Court be and is hereby reversed insofar as it relates to the dismissal of the Trustee in Bankruptcy.

It is so Ordered this 25th day of May, 1979.

Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DONALD D. REIMER and GLORIA C. REIMER, husband and wife,	)	
Plaintiffs,	)	
-vs-	)	
JEFFERSON J. BAGGETT, B & D TRUCKING, INC., a corporation, BEACON TIRE SERVICE NO. 2, a corporation, and RYDER TRUCK LINES, INC., a corporation,	)	
Defendants.	)	No. 79-C-47-C

DISMISSAL WITHOUT PREJUDICE

COME NOW the plaintiffs, Donald D. Reimer and Gloria C. Reimer, husband and wife, and hereby dismiss without prejudice their cause or causes of action as against the defendant, Ryder Truck Lines, Inc., a corporation, only, in the above styled and numbered action.

JONES, GIVENS, BRETT, GOTCHER,
DOYLE & BOGAN, INC.

By: Rodney A. Edwards

Rodney A. Edwards
201 West Fifth, Suite 400
Tulsa, Oklahoma 74103
Telephone: (918) 583-1115

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF MAILING

I hereby certify that on this 9 day of May, 1979, I mailed a true and correct copy of the above and foregoing Dismissal Without Prejudice to: Jack Thomas, 300 Oil Capital Building, Tulsa, Oklahoma 74103; and P. H. Hardin, P. O. Box 968, Fort Smith, Arkansas 72902, with proper postage thereon fully prepaid.

Rodney A. Edwards
Rodney A. Edwards

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

COMMANDER AIRLINES, INC., a New York corporation, Plaintiff, vs. DON PARRISH, d/b/a AIRE-KARE CORPORATION, and MID-STATES AIRCRAFT ENGINES, INC., an Oklahoma corporation, and AIRE-KARE CORPORATION, an Oklahoma corporation. Defendants.	)	No. 77-C-399-C

FILED

MAY 21 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

J U D G M E N T

The Court on May 21, 1979, filed its Findings of Fact and Conclusions of Law which are hereby incorporated herein and made a part of its judgment.

IT IS HEREBY ORDERED ADJUDGED AND DECREED that Judgment be entered in favor of the Defendant, Mid-States Aircraft Engines, Inc., the only remaining defendant in the case, in accordance with this Court's findings of fact and conclusions of law.

It is so ordered this 21st day of May, 1979.

H. DALE COOK
Chief Judge, U.S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

YVONNE FENNELL, Plaintiff,	)	
v.	)	No. 78-C-476-C
ECODYNE CORPORATION, Defendant.	)	

ORDER OF DISMISSAL WITH PREJUDICE

THIS MATTER coming before the Court on the Joint Stipulation of the parties for voluntary dismissal, with prejudice, of this cause of action and Complaint, pursuant to Rule 41(a)(1), of the Federal Rules of Civil Procedure, and the Court has therefore:

ORDERED, ADJUDGED AND DECREED, that this cause of action and Complaint are dismissed with prejudice.

United States District Judge

JCN:dg
4/13/79

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

WILLIAM G. EVANS,)
Plaintiff,)
v.) No. 78-C-577-C
FIRESTONE TIRE & RUBBER COMPANY, a corporation,)
Defendant.)

STIPULATION FOR DISMISSAL WITH PREJUDICE

The plaintiff and the defendant hereby stipulate that the above styled action may be dismissed with prejudice, the parties acknowledging that a compromise settlement of all claims has been concluded between the parties at the cost of defendant.

William G. Evans
WILLIAM G. EVANS

HALL, ESTILL, HARDWICK, GABLE, COLLINGSWORTH & NELSON

By Mike Barkley
Mike Barkley
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74103
Telephone: (908) 588-2700
ATTORNEYS FOR PLAINTIFF

John C. Niemeyer
John C. Niemeyer and Michael L. Noland of
FOLIART, MILLS & NIEMEYER
2020 First National Center
Oklahoma City, Oklahoma 73102
Telephone: (405) 232-4633
ATTORNEYS FOR DEFENDANT

ORDER OF DISMISSAL WITH PREJUDICE

On the written stipulation of the parties, the Court hereby orders that this action be, and the same hereby is, dismissed with prejudice at the cost of the defendant.

/S/ H. Dale Cook
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATED DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. PEGGY L. GLADNEY, a single person, and TULSA BELL FEDERAL CREDIT UNION, a federal credit union, Defendants.	)	CIVIL ACTION NO. 79-C-183-D

STIPULATION OF DISMISSAL

COME NOW the United States of America, Plaintiff, by and through its attorney, Robert P. Santee, Assistant United States Attorney, for the Northern District of Oklahoma, and Tulsa Bell Federal Credit Union, Defendant, by and through its attorney, E. J. Raymond, and stipulate and agree that this action be and that the same is herewith dismissed, without prejudice, each party to bear its own costs.

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

DRUMMOND, RAYMOND, YOUNG & PAYNE

E. J. Raymond, Attorney for
Defendant, Tulsa Bell Federal
Credit Union

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
MIAMI DIVISION

NORMA KEEBLE, Individually, and as Administratrix of the ESTATE OF KENNETH LESLIE KEEBLE and as Guardian of SUSAN RANA KEEBLE AND KENNETH DeWAYNE KEEBLE, Minors,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION 77-C-332-B
AMERICAN PRODUCE DISTRIBUTING COMPANY, ELWIN V. BROMLEY and THE CUMMINS CONSTRUCTION COMPANY, INC.,	)	
Defendants.	)	

ORDER OF DISMISSAL WITHOUT PREJUDICE

Now on this 14th day of May, 1979, the above styled matter coming on to be heard upon the Motion to Dismiss Without Prejudice filed by Elwin V. Bromley, Individually and as Administrator of the Estate of Michael Bromley, Deceased and the Court being fully advised thereon finds that said Motion should be sustained and granted;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Counter-Claim of Elwin V. Bromley, Individually and as Administrator of the Estate of Michael Bromley, Deceased, against the plaintiff, is hereby dismissed without prejudice.

/s/ H Dale Cook
Judge of the District Court

APPROVAL AS TO FORM AND SUBSTANCE:

NORMA KEEBLE, Individually and as Administratrix of the ESTATE OF KENNETH LESLIE KEEBLE and as Guardian of SUSAN RANA KEEBLE AND KENNETH DeWAYNE KEEBLE, Minors

By Tom Brookman
Tom Brookman

John D. Cheek
John D. Cheek

Loring T. Davis
Loring T. Davis

ELWIN V. BROMLEY, Individually and as Administrator of the ESTATE OF MICHAEL BROMLEY, Deceased

By Robert S. Gee
Robert S. Gee

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILLIAMS PIPELINE COMPANY)
)
Plaintiff,)
)
v.)
)
OIL, CHEMICAL AND ATOMIC WORKERS)
INTERNATIONAL UNION and its)
LOCAL 5-348,)
)
Defendants.)

No. 78-C-284-D

O R D E R

The Court has before it for consideration Plaintiff's Motion for Summary Judgment on its Complaint and Defendants' Motion for Summary Judgment on their Counterclaim. The Court has carefully reviewed the entire file, the briefs, authorities and the Recommendations of the Magistrate, and is fully advised in the premises.

This is an action brought pursuant to Section 301(a) of the Labor-Managment Relations Act of 1947, as amended, 29 U.S.C. § 185(a). Plaintiff, an employer engaged in commerce within the meaning of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 185 and 29 U.S.C. § 152(2) and (6), seeks to review and vacate a portion of an arbitration award. Defendants, labor organizations representing employees in an industry affecting commerce as defined by 29 U.S.C. § 152(3) and (5), seek to enforce said award.

Plaintiff and Defendants are parties to a collective bargaining agreement which provides for wages, hours and other conditions of employment. The collective bargaining agreement also provides, in Article XII, Paragraph 3, thereof that:

> "The Company reserves the right to discharge, suspend or lay off an employee for just cause."

On or about September 28, 1977, Plaintiff discharged several employees for the theft of gasoline from Plaintiff's pipeline. Pursuant to the grievance procedure provided in the collective bargaining agreement, the Defendants processed a grievance challenging the discharges to arbitration. At the time of the arbitration hearing, Plaintiff and Defendants stipulated two issues: (1) With respect to the employees

who had admitted to the theft of gasoline, the issue was whether the penalty of discharge was too severe for the offense committed; and (2) With respect to the employees who did not admit theft of gasoline, the issue was whether the employees were discharged for just cause. The parties then stipulated that these issues were properly before the Arbitrator.

On July 3, 1978 the Arbitrator rendered his decision in which he found that seven employees who had previously admitted stealing gasoline were in fact guilty of the alleged misconduct and went on to rule that the penalty of discharge was too severe and without just cause after considering all of the circumstances involved in the case. The Arbitrator ordered the reinstatment of the seven employees without back pay or seniority for the period from date of discharge to date of reinstatement. Effectively, the Arbitrator substituted an approximate eight (8) month suspension in lieu of discharge. Other aspects of the Arbitrator's award are not here in issue.

The power of the Court in reviewing an arbitration award is strictly limited. As the court said in Mistletoe Express Service v. Motor Expressman's Union, 566 F.2d 692, 694 (Tenth Cir. 1977):

> The narrow scope of judicial review of arbitration awards was outlined by the Supreme Court in the Steelworkers trilogy, Steelworkers v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403, Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409, and Steelwrokers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424. The courts may not review the merits of a grievance or an award. . . . An arbitration award will be enforced if "it draws its essence from the collective bargaining agreement.". . . In determining whether an award draws its essence from the Union contract, the courts have applied various tests. An arbitrator's award must be upheld unless it is contrary to the express language of the contract, . . . or unless it is "so unfounded in reason and fact, so unconnected with the working and purpose of the * * agreement as to 'manifest an infidelity to the obligation of the arbitrator'". . . . The award does not draw its essence from the agreement if "viewed in the light of its language, its context, and any other indicia of the parties' intention," it is without rational support.

See also Fabricut, Inc. v. Tulsa General Drivers, Warehousemen and Helpers Local 523, Tenth Cir., Nos. 77-1962, 77-1963 (April 23, 1979);

International Brotherhood of Electrical Workers, Etc. v. Professional Hole Drilling, Inc., 574 F.2d 497 (Tenth Cir. 1978); Campo Machining Co. v. Local Lodge No. 1926, Etc., 536 F.2d 330 (Tenth Cir. 1976).

In the Fabricut case, supra, several employees were discharged for failing to work the mandatory overtime assigned by the company. Grievances were instituted, and the dispute submitted to an Arbitrator. The Arbitrator "held that the company did not have just cause for the discharges, reduced the penalty to a one-month suspension, and directed Fabricut to reinstate the employees with seniority, back pay, and accrued benefits to the end of the suspension period." Slip Opinion at 3. In affirming the district court's decision upholding the Arbitrator's award, the Circuit Court distinguished Mistletoe:

> In Mistletoe we set aside an arbitration award which reduced a penalty from discharge to suspension. In that case there was a violation of a specific contract provision which expressely provided for discharge. In the case at bar no such provision is presented. Instead there is a contract violation which carries no stated penalty. The Arbitrator correctly rejected the employer-imposed penalty. In the light of the declared purposes of the grievance and arbitration procedure and under the powers given to the Arbitrator, he had the power to fashion what he deemed a proper penalty. When viewed in the light of the entire agreement, its context, and intent, the Arbitrator's award has rational support. Mistletoe, 566 F.2d at 694. We accept and affirm the award.

Slip Opinion at 6 - 7.

In the present case the Arbitrator found that the discharge of certain employees was "too severe and without just cause." Award, at 10. The Arbitrator also concluded that while the discharged employees had in fact stolen gasoline from the company, the circumstances required disciplinary action short of discharge:

> The arbitrator would have little difficulty in sustaining these discharges were it not for the involvement of the supervisors. It was evident from the testimony of all of the employees who admitted the theft of gasoline that most employees believed that supervisors were aware of the taking of gasoline that was going on. We do not have many details of the involvement of supervisors. The Company stated at the hearing that the four supervisors were discharged either for participating in theft of gasoline or being aware of it and not doing anything about it.
>
> One supervisor testified at the hearing. Mike Rinehart had been a bargaining unit employee at Kansas City, was then sent for training to Columbia, Missouri, and then returned to Kansas City as a

> supervisor. Rinehart admitted that he stole gasoline as a bargaining unit employee. He also admitted that he was aware that employees were taking gasoline when he came back as a supervisor. Incredible as it may seem, Rinehart testified that he was too busy to do anything about the stealing of gasoline. All that would have been required probably was the posting of a notice stating that regardless of what the practice had been in the past, anyone caught taking gasoline from the pipeline would be immediately discharged.
>
> It is evident from the testimony of the grievants that while they regarded the taking of gasoline as wrong, they nevertheless believed that this was permitted by the Company providing it was taken in small amounts from time to time. The supervisors were responsible for enforcing the employee rules. This they did not do. There is no evidence that during this long period of time there was any disciplinary action taken at the Kansas City terminal and pumping station with regard to stealing of gasoline. The supervisory staff must set the climate for employee behavior.
>
> At least two of the grievants testified with regard to the attitude and activities of terminal Superintendent Forbes, who was not discharged. Forbes had been chief engineer. One grievant testified that Forbes joked about the taking of gasoline by employees, referring to what he called the "Oklahoma credit card". The "Oklahoma credit card" was a five gallon can and a piece of hose. Oklahoma referred to the headquarters of the Company in Tulsa, Oklahoma. Whether or not this particular testimony is true is not perhaps important. But, it does represent the attitude of the supervisors generally.
>
> The arbitrator finds it difficult to believe that any of the supervisors were unaware of the taking of gasoline. It seems unlikely that a practice so widespread over a period of some five years would be unknown to any supervisor. If so, there would seem to be a need for supervisory training. In view of the climate created by these supervisors, and their failure to enforce employee rules of conduct, in order to justify discharge the Company should have put these employees on notice that henceforth the rules would be enforced.

Award at 8 - 9.

Plaintiff argues that by reason of Article XII, Paragraph 3 of the collective bargaining contract, the penalty to be imposed was entirely discretionary with the company, subject only to the Arbitrator's determination that "just cause" existed. The Arbitrator, however, specifically concluded that the circumstances surrounding the stealing of gasoline were such that "just cause" for the company's actions did not exist. In arguing that the Arbitrator's Award interferes with the company's discretion in imposing sanctions on employees, the company overlooks the fact that it agreed to have the Arbitrator determine the propriety of the sanction imposed:

> The Company and the Union agreed upon the issue in the case of the seven employees who admitted that they committed a theft of gasoline from the Company. The agreed issue was whether the penalty of discharge was too severe for the offense committed.
>
> The Company and the Union also agreed upon the issue in the cases of Green and Bozarth, who did not admit guilt of theft of gasoline. The issue agreed upon was: Were the grievants discharged for just cause.
>
> The parties then stipulated that these issues were properly before the arbitrator for decision.

Award at 7.

The Arbitrator's decision and Award shows that he carefully considered this dispute. The Court cannot say that the Arbitrator's decision was "so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling." Safeway Stores v. American Bakery and Confectionary W.I.U., Local 111, 390 F.2d 79, 82 (Fifth Cir. 1968); International Union of Electrical, Radio and Machine Workers, AFL-CIO v. Peerless Pressed Metal Corp., 489 F.2d 768 (First Cir. 1973).

The Court is, for the foregoing reasons, of the opinion that Plaintiff's Motion for Summary Judgment should be overruled and Defendants' Motion for Summary Judgment sustained. The Findings and Recommendations of the Magistrate are adopted insofar as they are consistent with the opinions expressed herein.

TI IS THEREFORE ORDERED that the Plaintiff's Motion for Summary Judgment be and the same is hereby overruled and Defendant's Motion for Summary Judgment be and the same is hereby sustained.

IT IS FURTHER ORDERED that Plaintiff offer immediate reinstatement to their former jobs the seven employees involved in this case; and that Plaintiff make each employee whole for lost compensation from the date of its refusal to abide by said award until the date of reinstatement or if any of the employees decline reinstatement to the date such employee(s) are to return to work for Plaintiff; and that Plaintiff shall make each employee whole for loss of seniority, pension credits,

and all other contractual benefits loss of which said employees suffered due to Plaintiff's failure to abide by the arbitration award from the date of Plaintiff's refusal to abide by said award until the date of reinstatement or if any of said employees decline reinstatement to the date such employee(s) are to return to work for Plaintiff.

It is so Ordered this 14th day of May, 1979.

Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DONALD CHURCH and LAURA CHURCH, Plaintiffs, vs. PATRICIA ROBERTS HARRIS, Secretary of Housing and Urban Developement, Federal Housing Administration, ERNIE BESHEAR and VIRGINIA BESHEAR: RUDY WYATT d/b/a RUDY WYATT REALTORS; and PROFESSIONAL HOME FINDERS, INC., Defendants.	)	CIVIL ACTION NO. 78-C-203-B

FILED

Jack C. Silver, Clerk
U. S. District Court

ORDER OF DISMISSAL

This matter comes before this court upon stipulation for dismissal by the parties herein and the court finds for good cause that the complaint and cross complaints should be dismissed.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the complaint and cross complaints of the above entited matter be dismissed.

Judge of the U. S. District Court.

37

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

N. D. CRUTCHER d/b/a N. D. CRUTCHER, Bankrupt 77-B-383	)	
N. D. CRUTCHER,	)	
Appellant,	)	
v.	)	No. 78-C-537-D
WARREN L. McCONNICO,	)	
Appellee.	)	

ORDER

The Court has for consideration the appeal from the Order of the Bankruptcy Court in the above cause overruling the Bankrupt's Application for Order Staying Proceedings, and has reviewed the file, the briefs and all of the recommendations concerning the appeal, and being fully advised in the premises, finds:

That the Order of the Bankruptcy Court should be affirmed and that the Trustee's Motion to Vacate the Order of the District Court of October 3, 1978 should be sustained for the following reasons:

The sole issue on this appeal involves the granting of immunity to the Bankrupt at a hearing ordered under Rule 205 of the Bankruptcy Rules on application of the Trustee. The Bankruptcy Judge has previously made a determination that the captioned matter is the personal and individual bankruptcy of N. D. Crutcher. There is also pending before the Bankruptcy Court the bankruptcy of a corporation in which Mr. Crutcher was the principal officer. On September 12, 1978 the Trustee filed an Application and obtained the issuance of an Order for the examination of the Bankrupt. The subject of the examination as reflected by the Application and Order in the record is the matter of a Judgment settlement made by Albert Elia Building Company, Inc. and Aetna Casualty & Surety Company of Hartford, Conn., in the Circuit Court of

the 19th Judicial District, Indian River County, Florida, 76-70. It has been determined that some time subsequent to the filing of the Bankruptcy the Bankrupt N. D. Crutcher recovered an amount in excess of $50,000.00 in settlement of the case. The settlement was not reported to the Trustee and only a portion of the funds have been turned over to the Trustee. It is claimed that the entire settlement represents assets of the Estate and a separate action is pending before the Bankruptcy Court in an adversary proceeding to recover these funds and to obtain other relief by way of an Order to Vacate Discharge of the Bankrupt on grounds that the funds represented by the settlement were wrongfully withheld.

Revocation of the discharge of the Bankrupt is possible in that proceeding by reason of the authority of Section 15 of the Bankruptcy Act which provides:

> The Court may revoke a discharge upon the application of a creditor, the trustee, the United States Attorney, or any other party in interest, who has not been guilty of laches, filed at any time within one year after a discharge has been granted, if it shall appear (1) that the discharge was obtained through the fraud of the bankrupt, that the knowledge of the fraud has come to the applicant since the discharge was granted, and that the facts did not warrant the discharge; or (2) that the bankrupt, before or after discharge, received or became entitled to receive property of any kind which is or which became a part of the bankrupt estate and that he knowingly and fraudulently failed to report or to deliver such property to the trustee; or (3) that the bankrupt during the pendency of the proceeding refused to obey any lawful order of, or to answer any material question approved by, the court. The application to revoke for such refusal may be filed at any time during the pendency of the proceeding or within one year after the discharge was granted, whichever period is longer.

The examination of the Bankrupt is provided in Section 7a(10) which is to the effect that the bankrupt shall:

> at the first meeting of his creditors, at the hearing upon objections, if any, to his discharge and at such other times as the court

> shall order, submit to an examination concerning the conducting of his business, the cause of his bankrupt, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge;

The Bankrupt did not appear as ordered October 4, 1978 at 11:00 A.M. in accordance with the Order and it is claimed by the Trustee that the Refusal of the Bankrupt to appear would be grounds for revocation of the discharge and that refusal to testify would also provide grounds for revocation of the discharge of the Bankrupt.

The Application filed with the Bankruptcy Court to stay proceedings is essentially a request for the granting of immunity from prosecution. The appeal of the Bankrupt is from the Order of the Bankruptcy Judge denying that application.

Prior to the Amendment of Section 7a(10) by Section 207 of the Organized Crime Control Act of 1970 it was well settled that the Bankrupt on examination need not answer incriminating questions, despite the fact that 7a(10) provided then that "no testimony given by him shall be offered in evidence against him in any criminal proceeding, except such testimony as may be given by him on the hearing upon objections to his discharge." This doctrine was based on the ground that this quoted provision did not afford Bankrupt complete protection. Arnstein v. McCarthy, 254 U.S. 71, 379, 46 AmB.R. 142, 357, 41 S.Ct. 26, 136, 65 L.Ed. 138, 314. See also Collier Treatise on Bankruptcy Sec. 7.21 Incriminating Testimony.

Sec. 7a(10) as amended by the Organized Crime Control Act of 1970 and as cited hereinabove, applies the immunity to testimony and to any evidence "directly or indirectly derived from such testimony."

In Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed. 2d 212 (1972), the Supreme Court considered the Organized Crime Control Act of 1970 and held that the government may compel testimony from an unwilling witness who invokes the Fifth Amendment privilege by conferring on the witness use and derivative use immunity.

Subsequent to Kastigar, the Ninth Circuit in Goldberg v. Weiner, (C.C.A. 9th 1973) 480 F.2d 1067, held that the conforming amendment to Sec. 7a(10) is sufficiently broad to grant immunity coextensive with the Fifth Amendment privilege which, therefore, is no bar to the compulsion of immunized testimony in a bankruptcy case.

The stated issues of the Bankrupt's Appeal are:

1. Whether or not Bankrupt is sufficiently imperiled by the possibility or probability of criminal action sufficient to invoke the provisions of the Fifth Amendment of the United States Constitution.

2. Whether or not, under the Fifth Amendment of the United States Constitution, the bankrupt has the right to remain silent without penalty, until the threat of prosecution has been fully eliminated.

The case of W. F. Breuss, Inc., CCH Bankruptcy Law Reports, No. 67,005, decided by the United States Court of Appeals for the 3rd Circuit is helpful in regard to these issues. In Breuss the Trustee applied to the Bankruptcy Court for an order directing the Appellant, John J. Mortimer, an accountant for the bankrupt, to appear for examination and to produce certain documents in his possession relating to the bankrupt's affairs. The purpose of this examination was to secure an adequate audit of the bankrupt. The Bankruptcy Judge, pursuant to Rule 205 of the Rules of Bankruptcy

Procedure, issued the requested order and authorized the Trustee to obtain a subpoena duces tecum if needed to effectuate Mortimer's examination. A subpoena was served upon Mortimer, and he filed a motion to quash with the Bankruptcy Court, in which he contended that the requested documents contain matters which may tend to incriminate him. The Bankruptcy Judge denied Mortimer's motion, and ordered that the requested material be produced and subjected to a judicial determination as to the applicability of the Fifth Amendment privilege. Mortimer appealed the denial of his motion to quash to the United States District Court and the District Court modified the Bankruptcy Judge's Order and directed that Mortimer appear before the District Court or, at his election, the Bankruptcy Court, for a hearing pursuant to the guidelines established by the Supreme Court in Hoffman v. United States, 341 U.S. 479 (1951), to determine the validity of his claim that his testimony at a Rule 205 examination and the requested document production would tend to incriminate him. The execution of that order was stayed pending appeal to the Court of Appeals which held that despite the assertions of self-evident incrimination, the bankrupt's accountant was properly ordered for a hearing to determine the validity of his claim that his testimony and production of requested documents pursuant to Bankruptcy Rule 205 examination would tend to incriminate him. It was for the Court and not for the witness accountant, to determine if the privilege against self-incrimination could be invoked. The hearing was required to be conducted under guidelines established in Hoffman v. United States, 341 U.S. 479 (1951)

In Hoffman v. United States, the Supreme Court held that "the witness is not exonerated from answering merely because he declared that in so doing he would incriminate

himself --- his say-so does not of itself establish the hazard of incrimination. It is for the Court to say whether his silence is justified." Hoffman v. United States, 341 U.S. 479 (1951).

The Bankrupt having full Constitutional immunity and having failed to properly invoke his claim to immunity in any event, IT IS ORDERED that the Order of the Bankruptcy Court denying the stay be and is hereby affirmed and IT IS FURTHER ORDERED that the Trustee's Motion to Vacate Order of October 3, 1978 be and is hereby sustained.

Dated this 14th day of May, 1979.

Fred Daugherty
United States District Judge

DOCKET NO. 330

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE SWINE FLU IMMUNIZATION PRODUCTS LIABILITY LITIGATION

Barbara L. Evans v. United States of America,
N.D. Oklahoma, Civil Action No. 79-C-187-C

CONDITIONAL TRANSFER ORDER

On February 28, 1978, the Panel transferred 26 related civil actions to the United States District Court for the District of the District of Columbia for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. §1407. Since that time, more than 300 additional actions have been transferred to the District of the District of Columbia. With the consent of that court, all such actions have been assigned to the Honorable Gerhard A. Gesell.

It appears from the pleadings filed in the above-captioned action that it involves questions of fact which are common to the actions previously transferred to the District of the District of Columbia and assigned to Judge Gesell.

Pursuant to Rule 9 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 78 F.R.D. 561, 567-68 (1978) the above-captioned tag-along action is hereby transferred to the District of the District of Columbia on the basis of the hearings held on January 27, 1978, May 26, 1978 and September 28, 1978, and for the reasons stated in the opinions and orders of February 28, 1978, 446 F. Supp. 244, July 5, 1978, 458 F. Supp 648, and January 16, 1979, 464 F. Supp. 949, and with the consent of that court assigned to the Honorable Gerhard A. Gesell.

This order does not become effective until it is filed in the office of the Clerk for the United States District Court for the District of the District of Columbia. The transmittal of this order to said Clerk for filing shall be stayed fifteen days from the entry thereof and if any party files a Notice of Opposition with the Clerk of the Panel within this fifteen-day period, the stay will be continued until further order of the Panel.

Inasmuch as no objection is pending at this time, the stay is lifted and this order becomes effective

MAY 1 1 1979

Patricia D. Howard
Clerk of the Panel

FOR THE PANEL:

Patricia D. Howard

Patricia D. Howard
Clerk of the Panel

1c

11th May

AK/jr
5/7/79

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 10 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

UNITED ALPINE LUMBER CO., Division of L & H Lumber Co., a corporation,	)	
Plaintiff,	)	
vs.	)	No. 78-C-593-C
CLOVERLEAF LUMBER COMPANY, INC., a corporation, and JAMES W. COTTINGIM,	)	
Defendants.	)	

PLAINTIFF'S NOTICE OF
PARTIAL DISMISSAL

COMES NOW the Plaintiff, and pursuant to Rule 41 of The Federal Rules of Civil Procedure dismisses its cause of action against Cloverleaf Lumber Company, Inc., only.

UNGERMAN, CONNER, LITTLE, UNGERMAN & GOODMAN

By _____
Attorneys for Plaintiff

LAW OFFICES
UNGERMAN, CONNER, LITTLE, UNGERMAN & GOODMAN
1710 FOURTH NATL. BANK BUILDING
TULSA, OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MICHAEL LEROY GLOVER,

Petitioner,

v.

NORMAN HESS,

Respondent,

and

THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,

Additional Respondent.

78-C-349-C

ORDER

This is a proceeding brought pursuant to the provisions of Title 28 U.S.C. § 2254, by a state prisoner confined at the Oklahoma State Penitentiary, McAlester, Oklahoma. Petitioner attacks the validity of the judgment and sentence rendered and imposed by the District Court of Osage County, State of Oklahoma, in Case No. CRF 74-838.

Petitioner demands his release from custody and as grounds therefor claims that he is being deprived of his liberty in violation of his rights under the Constitution of the United States of America. In particular, petitioner claims:

> "The constitutional rights, specifically the Fifth Amendment privilege to remain silent, was violated when the prosecuting attorney cross-examined the defendant before the jury concerning his failure to come forth and produce evidence and/or testify against the co-defendant, whose trial preceded the defendant's."

Petitioner has exhausted all those remedies available to him in the Courts of the State of Oklahoma with respect to the claim herein asserted.

In his state court trial the petitioner was convicted by a jury of Manslaughter in the First Degree and sentenced to a term of 101 years imprisonment. The direct appeal was taken to the Oklahoma Court of Criminal Appeals in Case No. F-76-78 and on November 30, 1976, that

Court affirmed the judgment and the sentence. Glover v. State, Okl. Cr. 557 P.2d 922 (1976). A petition for writ of certiorari to the United States Supreme Court was filed by the Petitioner which was denied on May 16, 1977.

The record in this case reveals that the Petitioner and the woman he lived with, Karen Sue Keene, were both charged with murder in connection with the death of Ms. Keene's two year old child from injuries received from the alleged beating of the child. While Keene and Petitioner were awaiting trial, Keene sent Petitioner a number of letters which tended to exculpate the Petitioner and inculpate Keene. Petitioner gave these letters to his attorney, Curtis Parks, who was representing both Keene and the Petitioner at the time Petitioner gave Parks the letters. Parks later withdrew as counsel for Keene and did not represent her at her trial, although Parks did attend Keene's trial as an observer at least during part of one day. Keene's trial was prior to Petitioner's trial, and Keene was acquitted. The letters were not made known by the Petitioner or his attorney Parks during the trial of Keene. Keene claimed that the Petitioner was responsible for the death of the child and the Petitioner claimed that Keene was responsible for the death of the child. During the course of Petitioner's trial the prosecutor on cross-examination of Petitioner questioned Petitioner as to why Petitioner did not bring the letters to the District Attorney during the time of the Keene trial. The following is the cross-examination in connection with the letters:

> "Q Now, after you were arrested, Mr. Glover, you spent some time in jail over here, didn't you?
>
> A Yes sir, I sure did.
>
> Q At the same time Karen Keene was over in jail right?
>
> A Yes sir.
>
> Q As I recall, you both were charged with murder in the first degree, right?
>
> A Yes sir.
>
> Q Did you get out of the jail before she did?
>
> A Some time just before she got out, yes sir.

Q During the time the two of you were in jail, did the two of you have some kind of communication? Did you talk back and forth?

A Yes sir.

Q Could you receive letters or notes from each other?

A Yes sir.

Q When you got out of jail did you take some of those notes to your attorney?

A Yes sir.

Q You've seen some of those notes here in the court room, haven't you, Mr. Glover?

A Yes sir.

Q Did those notes indicate to you that Karen Keene was guilty of this crime?

A Yes sir.

Q After you got out of jail, was Karen Keene tried to a jury?

A Yes sir.

Q Were you aware of the fact that she was being tried?

A Yes sir.

Q At that time, did you believe Karen Keene to be guilty of mistreating Shawn?

A Yes sir, yes sir.

Q Wasn't any doubt in your mind?

A No doubt in my mind.

Q Do you think she should have been punished?

A Yes sir.

Q Why didn't you bring those letters into the court room, or give my office, or have somebody place these letters before, or during the time we were trying Karen Sue Keene?

MR. PARKS: I'm going to object to that. He has already said he gave them to me.

THE COURT: It would be overruled.

Q Go ahead?

A I gave them to my lawyer.

Q Well, you knew at the time, Karen Sue Keene was being tried there was some evidence that would prove her guilty, and prove you innocent, is that right?

A I gave them to my lawyer. I didn't understand those letters to me. Yes, her guilty, yes; you betcha.

Q You never did go back and ask your lawyer for the letters?

A No sir, he was my lawyer and I let him handle my case.

Q You never did make known to my office, or any law enforcement officer, about those letters existing, did you?

A I don't know.

Q Well, did you tell any law enforcement officer up until the time, or during the time we were trying Karen Keene, that those letters did exist?

A No sir.

Q In other words, Mr. Glover, did it not bother you that Karen Sue Keene might walk off this charge, because you had the letters, and we didn't have them in evidence?

A I didn't know what I was going to do."

Tr. 759-762.

Prior to the time the defendant took the stand and was cross-examined in connection with the letters, both Keene and Petitioner's attorney Parks had testified concerning the letters. Parks testified that at the time of Keene's trial he had the letters in his possession; that because of his having been retained by Keene as her lawyer at the time he received the letters from Petitioner he felt that he could not turn the letters over to the District Attorney without breaching his attorney-client relationship with Keene; that at the time he received the letters he informed Keene that it appeared there was going to be a conflict in his representing both Keene and Petitioner; that he was in the process of withdrawing as Keene's attorney but had not done so until after he received the letters; that he did not reveal the letters until after Keene's trial at the time Keene took the witness stand at the preliminary hearing of Petitioner. Tr. 580-586, 600-603.

Keene was the principal witness against Petitioner. She testified that Petitioner was upset with Shawn (the child who died as a result of alleged beating by Petitioner) because Shawn was not paying attention to Petitioner; that Petitioner asked Shawn why he didn't like him

and that Shawn would not answer but just started crying; that Petitioner started hitting Shawn in the stomach; that Keene tried to get Petitioner to let Shawn go to bed but Petitioner refused; that Shawn started running to the bedroom; that Petitioner followed Shawn into the bedroom and pulled him out of bed and started whipping him; that Petitioner then took Shawn into the bathroom and threw him in the bathtub; that Shawn's head struck the bathtub at the time he was thrown into the bathtub by Petitioner; that Keene was able to get Shawn out of the bathtub; that Petitioner then took Shawn into the living room; that Keene followed Petitioner into the living room and when Keene arrived she saw Shawn's head hit the floor; that Petitioner then started hitting Shawn with Petitioner's belt; that Shawn appeared to be unconscious; that Keene told Petitioner there wasn't anything wrong with Shawn and he then took a lighted lamp and put the hot bulb against Shawn's bottom but Shawn did not move; that the bulb burned Shawn's skin and caused part of the skin to come off of Shawn's bottom. Tr. 255-267.

As to the letters Keene stated that she did write the letters to Petitioner while they were both in jail. In one of the letters to Petitioner, Keene stated:

> " * * * you didn't do anything to Shawn. How do you know what I did? * * * They said that if I didn't sign a statement against you that they would take little Mike away from me and give me life or life and a dark day. I didn't know what to do. It wasn't 14 hours after Shawn died that they started all of this."

Keene further testified on direct examination:

> "Q What did you mean in there, 'That if I didn't sign a statement against you that they would take little Mike away from me.' What about that language?
>
> A That was about the statements.
>
> Q About the statements?
>
> A Yes
>
> Q Did you yourself, beat or mistreat or torture Shawn?
>
> A No, I did not.

Q Did you yourself, assist, or help Mike Glover in beating, or mistreating your boy, Shawn?

A No, I did not.

Q Why did you put it in that letter?

A Because I was getting back at Mike. We could get off, and get back together, if he didn't get convicted or me. We could get back together, and I could do to him, what he done to my son."

Tr.289-290.

In its opinion in Glover, supra, at page 925, the Oklahoma Court of Criminal Appeals stated:

> "The defendant's first assignment of error is that the prosecuting attorney was allowed to cross-examine the defendant as to his silence regarding these letters at the time of Karen Keene's trial. However, a reading of the full transcript shows that no reversible error was committed. The letters were first put in evidence by the prosecution while Ms. Keene was on the stand with the expressed consent of the defense. She read the letters into the record, and testified that they had not been brought out at her trial. Then, when the defendant began his case in chief, his attorney took the stand as the first witness and testified, among other things, that the defendant had given him the letters upon being released from jail, but that at the time he had been attorney for both the defendant and Ms. Keene, and he had deemed it necessary under the attorney-client privilege to keep the letters and to not turn them over to the District Attorney when Ms. Keene was tried. Finally, when the defendant took the stand in his own behalf he made no mention of the letters whatsoever on direct testimony, but the District Attorney brought them up on cross-examination, and asked him why he had not given them to the District Attorney's Office before the trial of Ms. Keene. The defendant's answer was simply that he had turned them over to his attorney and that he did not know what the attorney had done with them; that he left all decisions concerning the case to his attorney. It is our opinion that it was not error to question the defendant as to the letters, since his attorney had as a witness raised the subject earlier in putting on the defendant's case in chief. However, even if it had been error it would not have been predjudicial to the defendant since he was able to give a rational explanation for his failure to mention the subject to the District Attorney before Karen Keene's trial."

In the Findings and Recommendations of Magistrate, filed December 4, 1978, the Magistrate agreed with the Oklahoma Court of Criminal Appeals that under the circumstances of this case, the cross-examination of Petitioner concerning his failure prior to trial to

make known his defense with respect to the letters was not error. This Court does not agree. Because there was no prior testimony to be impeached -- there was only petitioner's silence -- the only issue to which this line of questioning could have been relevant was petitioner's guilt. Such questions are clearly improper under such cases as Doyle v. Ohio, 426 U.S. 610, 91 S.Ct. 2240, 49 L.Ed.2d 91 (1976); and Grunewald v. U. S., 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957).

Even if the cross-examination of petitioner in this instance were used solely for impeachment, such questions would violate the holding in Doyle, supra, that:

> "the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment."
> 426 U.S. at 619.

However, where error of constitutional proportions has occurred, a reversal is required only where the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The test for harmless error was delineated in Hayton v. Egeler, 555 F.2d 599 (6th Cir. 1977) where the court stated:

> "The issue is whether the testimony about the silence could have influenced the jury and contributed to the conviction, Chapman v. California, supra, 386 U.S. at 23-24, 87 S.Ct. 824, so that 'absent the cross-examination . . ., "no juror could have entertained a reasonable doubt" as to petitioner's [appellant's] guilt.' Minor v. Black, supra, 527 F.2d at 5."
> 555 F.2d at 603.

In the instant case, this Court finds that the questions asked at trial concerning petitioner's silence as to the letters from Karen Keene were harmless beyond a reasonable doubt. In fact, it is likely that petitioner benefited from this line of questioning. Had the jury believed the letters were in evidence at Keene's trial, they could have concluded that the letters weren't convincing as to Ms. Keene's guilt and the corollary, petitioner's innocence. Had the prosecution not pointed out the unavailability of these letters at Ms. Keene's trial, it is conceivable that the defense would have. At any rate, it is apparent that such information was advantageous to petitioner.

Moreover, petitioner and his attorney, Curtis Parks, were able to explain the withholding of these letters as evidence in Keene's trial. When asked why he hadn't brought the letters to someone's attention during Keene's trial, petitioner responded that he had given the letters to "my lawyer" and that "he was my lawyer and I let him handle my case." Tr. p. 761. Petitioner's attorney, Curtis Parks, had already taken the stand and explained that at the time he became aware of the letters, he was also representing the author, Karen Keene, and was obligated to retain them because of the attorney-client privelege. Tr. pp. 580-81.

Finally, a review of the record reveals that ample evidence was introduced at trial from which the jury could have concluded that petitioner was guilty. This Court believes that it is highly unlikely that the cross-examination presently at issue figured prominately in this conviction.

In that petitioner was able to explain his silence, that the fact of the unavailability of the letters at Ms. Keene's trial was conceivably to petitioner's advantage, that considerable evidence was offered at trial establishing petitioner's guilt, and that this Court is presently unable to find any harm in the cross-examination now at issue, this Petition for Writ of Habeas Corpus is denied.

It is so ordered this 10th day of May, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ESCOA FINTUBE CORPORATION, an Oklahoma corporation,

Plaintiff,

vs.

TRANTER, INC., a Michigan corporation,

Defendant.

No. 76-C-572-C

FILED

MAY 10 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

On April 6, 1979, the Court entered its Findings of Fact and Conclusions of Law and Judgment in the above-captioned case. Now before the Court is the defendant's Motion to Amend Findings of Fact and Conclusions of Law.

Defendant asks that Conclusion of Law No. 9 be amended to change the word "nonobvious" to "obvious". The Court intended to employ the word "obvious". The inclusion of the word "nonobvious" was clearly a scrivener's error.

For the foregoing reason, it is therefore ordered that defendant's Motion is sustained and Conclusion of Law No. 9 is hereby amended as follows:

> 9. However, the '774 patent as well as the '228 patent are invalid because their subject matter is obvious. Title 35 U.S.C. § 103. See Sakraida v. Ag Pro, Inc., 425 U.S. 273, 96 S.Ct. 1532, 47 L.Ed.2d 784 (1976); Dann v. Johnston, 425 U.S. 219, 96 S.Ct. 1393, 47 L.Ed.2d 692 (1976); Anderson's-Black Rock, Inc. v. Pavement Salvage Co., Inc., 396 U.S. 57, 90 S.Ct. 305, 24 L.Ed.2d 258 (1969); Graham v. John Deere Co., 383 U.S. 1, 86 S.Ct. 684, 15 L.Ed.2d 545 (1966); Rutter v. Williams, 541 F.2d 878 (10th Cir. 1976); Scarramucci v. Dresser Industries, Inc., supra; Boutell v. Volk, 449 F.2d 673 (10th Cir. 1971); McCullough Tool Co. v. Well Surveys, Inc., supra.

It is so Ordered this 10th day of May, 1979.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 10 1979

INSULATION SERVICES, INC., a corporation,	)	
Plaintiff,	)	
vs.	)	
GLOBAL POWER COMPANY, a corporation,	)	
Defendant.	)	NO. 79-C-227-C

NOTICE OF DISMISSAL

TO: Robert I. Thomason, Jr.
102 South Court Square
Waverly, Tennessee 37185

Please take notice that, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the above entitled action is hereby dismissed without prejudice.

Thos H Trower

Thomas H. Trower
HOUSTON AND KLEIN, INC.
404 South Boston
Tulsa, Oklahoma 74103

(918) 583-2131

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing Notice of Dismissal was mailed, postage prepaid, to Robert I. Thomason, Jr., 102 South Court Square, Waverly, Tennessee 37185, on this 10th day of May, 1979.

Thos H Trower

THOMAS H. TROWER

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA and ALICE F. ROSS, Revenue Officer) Internal Revenue Service, Petitioners,	)	
vs.	)	NO. 79-C-71-D
MARY L. ROBERTS, Respondent.	)	

FILED
MAY 10 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER DISCHARGING RESPONDENT
AND DISMISSAL

On this 10 day of May, 1979, Petitioners' Motion to Discharge Respondent and for Dismissal came for hearing and the Court finds that Respondent has now complied with the Internal Revenue Service Summons served upon her November 15, 1978, that further proceedings herein are unnecessary and that the Respondent, Mary L. Roberts, should be discharged and this action dismissed.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED BY THE COURT that the Respondent, Mary L. Roberts, be and she is hereby discharged from any further proceedings herein and this action is hereby dismissed.

UNITED STATES DISTRICT JUDGE

4

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

United States of America, Plaintiff, vs. 30.00 Acres of Land, More or Less, Situate in Osage County, State of Oklahoma, and Donald E. Hazelwood, et al., and Unknown Owners, Defendants.	)	CIVIL ACTION NO. 78-C-302-C Tract No. 117

JUDGMENT

1.

NOW, on this 9th day of May, 1979, this matter comes on for disposition on application of the Plaintiff, United States of America, for entry of judgment on a stipulation of the parties agreeing upon just compensation, and the Court, after having examined the files in this action and being advised by counsel for Plaintiff, finds:

2.

This judgment applies to the entire estate condemned in Tract No. 117, as such estate and tract are described in the Complaint filed in this action.

3.

The Court has jurisdiction of the parties and subject matter of this action.

4.

Service of Process has been perfected either personally or by publication notice, as provided by Rule 71A of the Federal Rules of Civil Procedure, on all parties defendant in this cause who are interested in subject property.

5.

The Acts of Congress set out in paragraph 2 of the Complaint filed herein give the United States of America the right, power and authority to condemn for public use the property described in such Complaint. Pursuant thereto, on June 29, 1978, the United States of America filed its Declaration

of taking of such described property, and title to the described estate in such property should be vested in the United States of America as of the date of filing the Declaration of Taking.

6.

Simultaneously with filing the Declaration of Taking, there was deposited in the Registry of this Court, as estimated compensation for the taking of a certain estate in subject tract a certain sum of money, and all of this deposit has been disbursed, as set out below in paragraph 14.

7.

The defendants named in paragraph 14 as owners of the estate taken in subject tract are the only defendants asserting ownership of such property. The other defendants named in such paragraph, held a real estate mortgage on the subject tract on the date of taking, which mortgage has been paid and released of record. All other defendants having either disclaimed or defaulted, the named defendants, as of the date of taking were the owners and mortgagees of the estate condemned herein, and as such, are entitled to receive the just compensation awarded by this judgment.

8.

On May 8, 1979, a Stipulation, executed by the former owners of the estate taken in subject tract, and the United States of America, was filed herein, whereby certain property situated upon the subject tract on the date of taking herein, was excluded from the taking and title thereto was revested in the former owners. Such exclusion of property should be approved by the Court.

9.

The Stipulation described in paragraph 8 above also contained a stipulation as to the amount of just compensation for the estate condemned in the subject tract, and such stipulation as to compensation should be approved by the Court.

10.

This judgment will create a deficiency between the amount deposited as estimated compensation for the estate taken in subject tract and the amount

fixed by the Stipulation as to Just Compensation, and the amount of such deficiency should be deposited for the benefit of the owners. Such deficiency is set out in paragraph 14 below.

11.

It is, Therefore, ORDERED, ADJUDGED AND DEGREED that the United States of America has the right, power and authority to condemn for public use the tract designated as Tract No. 117, as such tract is particularly described in the Complaint filed herein; and such tract, to the extent of the estate described in such Complaint (but subject to the exclusion provided below in paragraph 13) was condemned, and title thereto vested in the United States of America as of June 29, 1978, and all defendants herein and all other persons interested in such estate are forever barred from asserting any claim (except as to such excluded property) to such estate.

12.

It is Further ORDERED, ADJUDGED AND DECREED that on the date of taking, the owners of the estate condemned herein in subject tract were the parties whose names appear below in paragraph 14 and the interest of each party was as therein indicated; and the right to receive the just compendation awarded by this judgment is vested in the parties so named.

13.

It is Further ORDERED, ADJUDGED AND DECREED that the agreement of the former owners and the Plaintiff, regarding exclusion of certain property from the taking in this case, as set forth in the Stipulation (described in paragraph 8 above) filed herein on May 8, 1979, hereby is approved.

14.

It is Further ORDERED, ADJUDGED AND DECREED that the agreement as to just compensation, described in paragraph 9 above, hereby is approved and the amount therein fixed by the parties is adopted by the Court as the award of just compensation for the estate taken in the subject tract in this case, as shown in the schedule which follows, to-wit:

TRACT NO. 117

Owners:

Donald E. Hazelwood and
Donna Marie Hazelwood

Subject to a mortgage owned by:

The First National Bank of Dewey,
which mortgage now has been paid in full and
released of record.

Award of Just Compensation pursuant to Stipulation ----------	$19,000.00	$19,000.00
Deposited as estimated compensation ----------	$14,400.00	
Paid to owners and mortgagee jointly ----------		$14,400.00
Balance due to owners ----------		$ 4,600.00
Deposit deficiency ----------	$4,600.00	

15.

It is Further ORDERED, ADJUDGED AND DECREED that the United States of America shall deposit in the Registry of this Court in this civil action, to the credit of subject tract, the deposit deficiency in the sum of $4,600.00, and the Clerk of this Court then shall disburse the deposit for such tract as follows:

To - Donald E. Hazelwood and

Donna Marie Hazelwood, jointly ----------$4,600.00

UNITED STATES DISTRICT JUDGE

APPROVED:

HUBERT A. MARLOW
Assistant United States Attorney

FILED

MAY - 9 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 79-C-166-D
IVORY JUNIOR FREEMAN, et. al., Defendants.	)	

STIPULATION OF DISMISSAL

COME NOW the United States of America by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and The Froug Company, Inc., by and through its attorney, Mary P. Davis, and the County Treasurer of Tulsa County and the Board of County Commissioners of Tulsa County, by and through their attorney, John F. Reif, Assistant District Attorney of District No. 14, Tulsa County, and stipulate and agree that this action be and the same is hereby dismissed without prejudice.

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant United States Attorney

MARY P. DAVIS
Attorney for Defendant,
The Froug Company, Inc.

JOHN F. REIF
Assistant District Attorney
Attorney for Defendants,
County Treasurer and
Board of County Commissioners
of Tulsa County

IEU:sgn
4/30/79

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BENDE & SONS, INC., a corporation,

Plaintiff,

vs.

GLENN BERRY MFRS., INC., a corporation,

Defendant.

No. 79-C-149

FILED

MAY 9 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER DISMISSING COMPLAINT AND COUNTER-CLAIM

NOW, on this 9 day of May, 1979, there having been presented to the undersigned Judge of the United States District Court for the Northern District of Oklahoma, the joint application filed herein by the Plaintiff and the Defendant seeking an Order of this Court dismissing the complaint filed by the Plaintiff with prejudice and the dismissal of the counter-claim filed by the Defendant with prejudice in that all of the matters involved in the above styled and numbered litigation have been completely settled to the satisfaction of the parties.

IT IS THEREFORE ORDERED BY THIS COURT that the complaint of the Plaintiff filed herein be and the same is hereby ordered dismissed with prejudice.

IT IS FURTHER ORDERED BY THIS COURT that the counter-claim filed herein by the Defendant be and the same is hereby ordered dismissed with prejudice.

United States District Judge

APPROVED:

UNGERMAN, CONNER, LITTLE, UNGERMAN & GOODMAN

By _____
Attorneys for Plaintiff

SNEED, LANG, ADAMS, HAMILTON, DOWNIE & BARNETT

By _____
Attorneys for Defendant

LAW OFFICES
UNGERMAN, CONNER, LITTLE, UNGERMAN & GOODMAN
1710 FOURTH NATL. BANK BUILDING
TULSA, OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ROBERT RANDALL ZIEGLER,)
)
Plaintiff,)
)
v.) No. 78-C-372-C
)
PETE SILVA, JR., BUDDY)
FALLIS, JR., MEMBERS OF)
BUDDY FALLIS' STAFF LISTED)
AS JOHN DOE ASSISTANTS,)
)
Defendants.)

ORDER

The Court has for consideration Plaintiff's Motion to Compel Discovery and Motion for Protective Order, Motion to Compel Discovery and Motion for Certification of Order, Motion Requesting Disqualification, Motion to Compel Discovery, Requesting Standing Objection and for Protective Order, Motion to Compel Motion for Certification to the Supreme Court, Application for Appointment of Counsel, and Defendant District Attorney Fallis' Motion to Dismiss and has reviewed the file, the briefs and all of the recommendations concerning the motions, and being fully advised in the premises, finds:

That Plaintiff's Motions noted above should be overruled, and that Defendant District Attorney Fallis' Motion to Dismiss should be sustained for the following reasons:

This is an action brought by Plaintiff Robert Randall Ziegler, an inmate of the Oklahoma State Prison, McAlester, Oklahoma, against Defendant Pete Silva, (Silva) his prior attorney in certain criminal cases in the District Court of Tulsa County, Oklahoma and Defendant S. M. Fallis, Jr., (Fallis) District Attorney of Tulsa County, Oklahoma, under the provisions of 42 U.S.C. §1983 and §1985. Plaintiff claims that he was convicted of certain felonies due to the joint conspiracy of Silva and Fallis to deny his constitutional rights to due process in the course of those prosecutions; that Fallis suppressed evidence; that Fallis

personally knew the evidence used in those prosecutions had nothing to support it; that Fallis knew of witnesses who were brought to his attention, including a "look-alike to Plaintiff" but that Fallis conspired to hide this evidence and that Fallis' additionally made offers to Silva that he would employ Silva as Assistant District Attorney.

In his Motion to Dimiss, Fallis requests the Court to dismiss this suit for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Fallis asserts that he is, and was at all material times, duly qualified and acting District Attorney of Tulsa County, Oklahoma, and that all actions allegedly taken by him in the course of the prosecutions complained of by Plaintiff were pursuant to, and in the course of, his official statutory capacity as District Attorney. Fallis further aserts that all actions allegedly taken by him were in good faith and within the scope and authority of his official capacity as District Attorney, in the prosecution of Plaintiff for violations of the Statutes of the State of Oklahoma.

As District Attorney Fallis is accorded absolute immunity as a judicial officer provided he has acted at all times within the scope and authority of his official capacity as District Attorney. See Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed 128 (1976); Forsythe v. Kleindienst, 447 F.Supp. 192, (E.D. Pa., 1978); Butz v. Economou, ____U.S.____, 46 L.W. 4952 (No. 76-709, 6-29-78); Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); Blevins v. Ford, 572 F.2d 1336 (9th Cir., 1978); Procunier v. Navarette, 434 U.S. 555, (1978), Elsberry v. Haynes, 256 F.Supp. 735 (W.D. Okl., 1966); Stump v. Sparkman, 435 U.S. 349 (1978); Cawley v. Warren, 216 F.2d 74 (7th Cir., 1954); Hagan v. State of

California, 265 F.Supp. 174 (D.C. Cal., 1967); Bauers v. Heisel, 361 F.2d 581 (3rd Cir. 1966).

Under the allegations contained in Plaintiff's Complaint it appears that Fallis, as District Attorney of Tulsa County, Oklahoma, acted within his jurisdiction as District Attorney in prosecuting the six felony convictions sustained by Plaintiff in the District Court of Tulsa County, Oklahoma, and as an integral part of the judicial process. He is therefore shielded from Plaintiff's claim for damages herein by virtue of the doctrine of quasi judicial immunity.

In Imbler v. Pachtman, 424 U.S. 409 (1976), the Supreme Court stated:

> "We conclude that the considerations outlined above dicatate the same absolute immunity under § 1983 that the prosecutor enjoys at common law. To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. (Footnotes omitted."

The Court also noted:

> "Various post-trial procedures are available to determine whether an accused has received a fair trial. These procedures include the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies. In all of these the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under law. This focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment. (Footnote omitted)"

Unless the acts complained of are clearly outside the authority or jurisdiction of the office, the prosecutor

should have absolute immunity from a civil action for damages. In Bauers v. Heisel, 361 F.2d 581 (3rd Cir. 1966) the Court said:

> "Because immunity is conferred on an individual solely by virtue of the office he holds, reason requires us to adopt a rule which does not provide immunity for those acts which are done outside the authority or jurisdiction of the office." 361 F.2d at 590, 591.

See also McNamara v. Hawks, 354 F.Supp. 492 (S.D. Fla. 1973). Where the Court dismissed the 42 USC § 1983 action against the prosecuting attorney in which the Plaintiff had alleged that the prosecution had made unfair remarks to the jury suggesting plaintiff's guilt and had also conspired to keep a witness favorable to the plaintiff from testifying. The Court held that the prosecutor enjoyed immunity from damage claims arising out of such acts, stating:

> "The immunity exists despite the alleged improper use of such authority so long as the alleged wrongful acts were conducted within the apparent jurisdiction. See Mullins v. Oakley, 437 F.2d 1217 (4th Cir. 1971; Goodwin v. Williams, 293 F.Supp. 770 (D.C. Tex. 1968)."

In the case of Atkins v. Lanning, 556 F.2d 485 (10th Cir., 1977), affirming Atkins v. Lanning, 415 F.Supp. 186 (N.D. Ok. 1976), the prosecutor was alleged to have conspired with others in the unlawful arrest and confinement of the plaintiff. The Court sustained a Motion for Summary Judgment finding that the bringing of the criminal charge without probable cause was within the quasi-judicial role for which the Supreme Court in Imbler has provided absolute immunity.

In Gaito v. Strauss, 249 F.Supp. 923, (W.D. Penn., 1966) the Court dismissed the plaintiff's 42 U.S.C. §§ 1983 and 1985 action against the district attorney for damages for allegedly conspiring with others to convict the plaintiff of certain crimes in the Courts of Pennsylvania through the

use of illegally obtained evidence, perjured testimony and other violations of plaintiff's constitutional rights. In its opinion the Court states:

> "Judges and district attorneys acting in their official capacities in connection with criminal and commitment proceedings are entitled to absolute immunity from Civil Rights Act and other damage suits arising out of their judicial and quasi-judicial acts, without regard to their alleged motives in so acting, and notwithstanding such acts may have been performed in excess of jurisdiction. (Citations omitted)" Gaito at 930.

The District Court in Clark v. Zimmerman, 394 F.Supp. 1166 (M.D. Pa., 1975) dismissed the Plaintiff's Complaint as frivolous, pursuant to 28 U.S.C. § 1915(d), without issuance of process. The thrust of Plaintiff's Complaint in Zimmerman was that he had been arbitrarily arrested, incarcerated, and held for trial by the individual and concerted acts of a police officer, magistrate and district attorney in a manner that violated his constitutional rights. The district attorney was alleged to have exerted undue influence on the magistrate so as to cause the plaintiff to be held for grand jury action on false criminal charges without a proper evidentiary hearing.

The Court stated:

> "The only exception to judicial and prosecutorial immunity are acts of a judge or prosecuting attorney which are clearly outside his jurisdiction, as distinguished from acts which are merely in excess of his jurisdiction, the latter not being actionable. (Citations omitted)" Zimmerman at 1175.

In the case of Ney v. State of California, 439 F.2d 1285 (9th Cir. 1971) the Court held that even though the facts alleged that the prosecutor knowingly used altered tapes in the trial of the defendant, the acts were done in the course of the prosecuting function and therefore he had complete immunity.

The ruling of the Court in Ney is consistent with Imbler, supra, where the Supreme Court cautioned that absolute immunity does in some cases "leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty." Imbler, supra at 427.

Because of the finding of this Court that the Plaintiff's Complaint does not allege facts to show that the defendant Fallis acted clearly outside the scope of his authority or jurisdiction, it is the view of the Court that the defendant is entitled to complete immunity from liability for damages under 42 U.S.C. § 1983.

Plaintiff also fails in his § 1985(3) conspiracy allegations for the reason that Plaintiff alleges no race or class-based invidiously discriminatory animus behind conspirators' actions. See Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338. Atkins v. Lanning, 415 F.Supp. 186 (N.D. Okla. 1976), affirmed Atkins v. Lanning, 556 F.2d 485 (10th Cir., 1977).

IT IS, THEREFORE, ORDERED that Fallis' Motion to Dismiss be and is hereby sustained; that Plaintiff's Motion to Compel Discovery and Motion for Certification of Order, Motion Requesting Disqualification, Motion Requesting Default Judgment against Defendant Fallis, Motion Requesting Grand Jury Probe, Motion to Compel Discovery, Requesting Standing Objection and for Protective Order, Motion to Amend Motion to Compel Motion for Certification to the Supreme Court, and Application for Appointment of Counsel be and are hereby overruled.

Dated this 8th day of May, 1979.

H. Dale Cook
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO. 78-C-602-BC
	)	
LEONARD J. TURNER,	)	
	)	
Defendant.	)	

DEFAULT JUDGMENT

This matter comes on for consideration this 8th day of May, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Leonard J. Turner, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Leonard J. Turner, was personally served with Summons and Complaint on March 26, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Leonard J. Turner, for the sum of $2,692.12, less the sum of $50.00 which has been paid, plus the costs of this action accrued and accruing.

H. Dale Cook
UNITED STATES DISTRICT JUDGE

APPROVED:

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

United States of America, Plaintiff, vs. 27.96 Acres of Land, More or Less, Situate in Osage County, State of Oklahoma, and Victor Louis Red Eagle, et al., and Unknown Owners, Defendants.	CIVIL ACTION NO. 77-C-373-D Tracts Nos. 714, 714E-1 and 714E-3

J U D G M E N T

1.

NOW, on this 7th day of May, 1979, this matter comes on for disposition on application of Plaintiff, United States of America, for entry of judgment on a stipulation agreeing upon just compensation, and the Court, after having examined the files in this action and being advised by counsel for the Plaintiff, finds:

2.

This judgment applies to the entire estate condemned in the tracts listed in the caption hereof, as such estate and tracts are described in the Complaint filed in this action.

3.

The Court has jurisdiction of the parties and subject matter of this action.

4.

Service of Process has been perfected either personally or by publication notice, as provided by Rule 71A of the Federal Rules of Civil Procedure, on all parties defendant in this cause who are interested in subject property.

5.

The Acts of Congress set out in paragraph 2 of the Complaint filed herein give the United States of America the right, power, and authority to condemn for public use the estate described in said Complaint. Pursuant thereto, on September 1,

1977, the United States of America filed its Declaration of Taking of such described property, and title to the described estate in such property should be vested in the United States of America as of the date of filing said Declaration of Taking.

6.

Simultaneously with filing the Declaration of Taking, there was deposited in the Registry of the Court as estimated compensation for the taking of a certain estate in subject property a certain sum of money and none of this deposit has been disbursed, as set out below in paragraph 12.

7.

On the date of taking in this action, the owner of the estate taken in subject property was the defendant whose name is shown below in paragraph 12. Such named defendant is the only person asserting any interest in the estate taken in such tracts. All other persons having either disclaimed or defaulted, such named defendant is entitled to receive the just compensation awarded by this judgment.

8.

The owner of the subject property and the United States of America have executed and filed herein a Stipulation As To Just Compensation wherein they have agreed that just compensation for the estate condemned in subject property is in the amount shown as compensation in paragraph 12 below. Before filing, this stipulation was approved by the U. S. Department of Interior and the District Court for Osage County, State of Oklahoma. This stipulation should be approved by this Court.

9.

This judgment will create a deficiency between the amount deposited as estimated compensation for subject property and the amount fixed by the Stipulation As To Just Compensation; and the amount of such deficiency should be deposited for the benefit of the owner. Such deficiency is set out below in paragraph 12.

10.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power, and authority to condemn for public use the property particularly described in the Complaint filed herein; and such property, to the extent of the estate described in such Complaint, is condemned, and title to such described estate is vested in the United States of America as of September 1, 1977, and all defendants herein and all other persons interested in such estate are forever barred from asserting any claim to such property.

11.

It Is Further ORDERED, ADJUDGED and DECREED that on the date of taking the owner of the estate condemned herein in subject property was the defendant whose name appears below in paragraph 12 and the right to receive the just compensation for the estate taken herein in this property is vested in the party so named.

12.

It Is Further ORDERED, ADJUDGED and DECREED that the Stipulation As To Just Compensation, described in paragraph 8 above, hereby is confirmed; and the sum therein fixed is adopted as the award of just compensation for the estate condemned in subject property as follows:

TRACTS NOS. 714, 714E-1 and 714E-3

OWNER: Matthew Kane, Jr., Guardian of
Victor Louis Red Eagle, Incompetent

Award of just compensation pursuant to Stipulation --------	$7,000.00	$7,000.00
Deposited as estimated compensation ----------	6,545.00	
Disbursed to owner ----------		None
Balance due to owner ----------		$7,000.00
Deposit deficiency ----------	$ 455.00	

13.

It Is Further ORDERED, ADJUDGED and DECREED that the United States of America shall deposit in the Registry of this Court, in this Civil Action, to the credit of subject property, the deficiency sum of $455.00, and the Clerk of this Court then shall disburse the deposit for subject tracts to Matthew Kane, Jr., Guardian of Victor Louis Red Eagle, Incompetent -- $7,000.00.

UNITED STATES DISTRICT JUDGE

APPROVED:

HUBERT A. MARLOW
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY - 7 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JAMES R. ISLEY and CHARLENE ISLEY,

Plaintiffs,

vs.

AMERICAN ESTATE LIFE INSURANCE COMPANY,

Defendants.

NUMBER 78-326-C

O R D E R

Now on this 7th day of May, 1979, there comes on for consideration the Stipulation for Dismissal signed and presented by and on behalf of all parties to the captioned case pursuant to Rule 41(a) of the Federal Rules of Civil Procedure. On the basis of such stipulation and being fully advised in the premises, the Court determines that this action should be dismissed with prejudice.

IT IS, THEREFORE, ORDERED that the above-entitled action is dismissed with prejudice to the refiling of same, each party to bear its own costs, including attorneys' fees.

H. Dale Cook
UNITED STATES DISTRICT JUDGE

DLP/js

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

THURMOND CAROL KNIGHT, Plaintiff,	)	
-vs-	)	NO. 77-C-138-C
E. PIERCE, et al., Defendants.	)	

O R D E R

NOW on this 30th day of April, 1979, this matter comes before the Court for scheduled pretrial conference. Plaintiff appears not; defendants appear by and through their attorney, David L. Pauling.

The Court, having carefully examined all pleadings filed herein, and being familiar with the nature of the controversy herein presented, and the allegations and defenses of the parties hereto, find:

1. Plaintiff's complaint was filed on April 11, 1977, and this lawsuit has been pending for more than two years;

2. That the defendants herein, on June 23, 1978, requested an order of the Court dismissing this lawsuit for failure to prosecute; said motion was thereafter overruled on the basis of "excusable neglect";

3. That notice of the pre-trial conference scheduled this date was duly mailed to the plaintiff by the Court on March 27, 1979. Subsequent to the issuance of this notice, plaintiff has had no contact either with the Court or with the defendants' counsel;

4. That the plaintiff's failure this date to appear at the scheduled pre-trial conference is not in compliance with the Court's notice of pre-trial conference given plaintiff on March 27, 1979;

5. That, considering the foregoing circumstances, it is appropriate for the Court to enter default judgment against the plaintiff pursuant to Rule 32(b) of the United States District Court for the Northern District of Oklahoma;

6. That the defendants have duly served plaintiff with notice as required by Rule 55 F.R.C.P., and plaintiff has made no response thereto to the Court.

IT IS THEREFORE ORDERED that, pursuant to Rule 32(b) of the Rules of the United States District Court for the Northern District of Oklahoma, that default judgment be entered herein against the plaintiff, with costs assessed against the plaintiff.

H. Dale Cook, Chief Judge
United States District Court for
the Northern District of Oklahoma

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOBBY JOE HARRISON
and REGINA HARRISON,
husband and wife,

Plaintiff,

and

AMERICAN MOTORISTS
INSURANCE COMPANY,

Third Party Plaintiff,

Vs.

LION UNIFORM, INC.,

Defendant.

NO.
77-C-181-C

AMENDED JUDGMENT

This action came on for trial before the Court and Jury, the Honorable H. Dale Cook, District Judge, presiding, the issues having been duly tried and the Jury having duly rendered its verdicts as follows: For the plaintiff Bobby Joe Harrison and against the defendant Lion Uniform, Inc., and fixing his damages in the amount of $57,506.00; and further finding for the plaintiff Regina Harrison and fixing her damages in the amount of $0.00.

IT IS ORDERED AND ADJUDGED that plaintiff Bobby Joe Harrison, his attorneys Sellers & Harlan and McBride, Bell & Bonnell, Inc., and third party plaintiff American Motorists Insurance Company, recover of the defendant Lion Uniform, Inc., the sum of $57,506.00, with interest thereon as provided by law and costs of this action, to be apportioned pursuant to further Order of this Court in accordance with 85 Oklahoma Statutes §44.

IT IS ORDERED AND ADJUDGED that the plaintiff Regina Harrison recover of the defendant Lion Uniform, Inc., the sum of $0.00 and her costs of the action.

Dated this 7th day of May, 1979.

Judge of the United States
District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JERRY L. ROGERS, a minor, by his father and next friend, BILLY JOE ROGERS,

Plaintiff,

vs.

THE BOARD OF EDUCATION OF WYANDOTTE OKLAHOMA SCHOOL DISTRICT, Lee Jeffery, Robert Wilson, Betty Fields, Dan Leisure, Jerry Strait, Ellen Gourd, and Richard Roark,

Defendants.

No. 78-C-221-C

ORDER OF DISMISSAL WITHOUT PREJUDICE

IT IS ORDERED, ADJUDGED AND DECREED by this Court, pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, and upon motion timely made by attorney for plaintiff and filed herein, that defendants Betty Fields, Dan Leisure, Jerry Strait, Ellen Gourd, and Richard Roark are hereby dismissed from this case without prejudice.

Judge of the District Court

19

SEB:sls
4/24/79

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SAUDER WOODWORKING COMPANY, a corporation, Plaintiff,	
vs.	NO. 79-C-169-C
HENRY EDWARD HANOCH, a sole trader, d/b/a GENERAL MILL & FIXTURES, Defendant.	

FILED

MAY 4 1979

Jack C. Silver, Clerk
U.S. DISTRICT COURT

J U D G M E N T

The Defendant, Henry Edward Hanoch, a sole trader, d/b/a General Mill & Fixtures, having been regularly served with process and having failed to appear and answer to the Plaintiff's Complaint on file herein, and the default of the Defendant has been heretofore entered and it appears that the Defendant is not an infant or incompetent person, and an affidavit of non-military service having been filed herein, it appears from the affidavit that the Plaintiff is entitled to a judgment.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED BY THIS COURT that the Plaintiff, Sauder Woodworking Company, a corporation, have and recover a judgment of and against the Defendant, Henry Edward Hanoch, a sole trader, d/b/a General Mill & Fixtures, the sum of $13,474.14 with interest thereon at the rate of 10% per annum from date of judgment, together with an attorney fee in the amount of $3,000.00 for the use and benefit of Plaintiff's counsel herein, together with costs in the sum of $22.32.

Dated this 4th day of May, 1979.

Chas. Goodbook
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

MIAMI DIVISION

NORMA KEEBLE, Individually
and as Administratrix of the
ESTATE OF KENNETH LESLIE KEEBLE
and as Guardian of SUSAN
RANA KEEBLE AND KENNETH
DeWAYNE KEEBLE, Minors

VS.

CIVIL ACTION NO. 77C332-B

AMERICAN PRODUCE DISTRIBUTING
COMPANY, ELWIN V. BROMLEY and
THE CUMMINS CONSTRUCTION
COMPANY, INC.

O R D E R

Now on this 4th day of May, 1979, upon the written application of the Plaintiffs and Defendants, American Produce Distributing Company and Elwin V. Bromley, for a dismissal with prejudice of the Complaint against said Defendants, only, the Court having examined said application, finds that said parties have entered into a compromise settlement covering any and all claims as to these defendants, executing a Covenant Not to Sue as to said Defendants, and have requested the Court to dismiss said Complaint with prejudice as to these Defendants only. The Court being fully advised in the premises, finds that said settlement is reasonable and proper and that said Complaint should be dismissed pursuant to said application, reserving and preserving any and all claims, causes of action and damages which Plaintiff has had, does have or will have in the future against The Cummins Construction Company, its agents, servants, representatives and insurance companies.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiffs do have and recover of and from the Defendants, ELWIN V. BROMLEY AND AMERICAN PRODUCE DISTRIBUTING COMPANY, the sum of Ninety Thousand Dollars ($90,000.00), which said sum shall be paid as follows:

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1. The Defendants shall pay the sum of $10,333.00 directly to United States Fidelity and Guaranty and Tom Brookman;

2. The Defendants shall pay the sum of $10,000.00 directly to Norma Keeble, Guardian of Kenneth Dewayne Keeble;

3. The Defendants shall pay the sum of $10,000.00 directly to Norma Keeble, Guardian of Susan Rana Keeble;

4. The Defendant shall pay the sum of $2,553.85 directly to Norma Keeble, Administratrix of the Estate of Kenneth L. Keeble, Deceased and Shannon's Funeral Chapels;

5. The Defendants shall pay the sum of $57,114.00 directly to Norma Keeble and her attorney, Tom Brookman, to cover her portion of the settlement and attorney fees.

IT IS FURTHER ORDERED ADJUDGED AND DECREED by the Court that the Complaint and all causes of action of the Plaintiffs against American Produce Distributing Company and Elwin Bromley filed herein be and the same hereby is dismissed with prejudice to any future action against the Defendants, American Produce Distributing Company and Elwin Bromley, reserving any and all claims against any other Defendant, including The Cummins Construction Company, its agents, servants, representatives, and insurance companies.

JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

APPROVALS:

TOM BROOKMAN

ATTORNEY FOR THE PLAINTIFFS

ALFRED B. KNIGHT

ATTORNEY FOR THE DEFENDANT, AMERICAN PRODUCE DISTRIBUTING COMPANY

ROBERT GEE

ATTORNEY FOR DEFENDANT, ELWIN V. BROMLEY

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

EARL E. HENRY, JR.,

Plaintiff,

v.

UNITED STATES OF AMERICA,
BILL McKINNEY and BOB BROWN,

Defendants.

Civil No. 79-C-36-D

FILED

MAY 4 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The Court has before it for consideration the motion to dismiss of defendant Bob Brown, pursuant to Federal Rules of Civil Procedure 12(b)(1), (2), and (6).

This action is brought for the recovery of a penalty allegedly illegally and erroneously assessed and collected against the plaintiff under 26 U.S.C. § 6672. The plaintiff alleges that jurisdiction is conferred upon this Court by 28 U.S.C. § 1346(a)(1). The plaintiff also invokes this Court's pendent jurisdiction as empowering the Court to adjudicate the plaintiff's claims against defendants Brown and McKinney.

The Plaintiff, Earl Henry, alleges that the District Director of the Internal Revenue Service assessed a penalty against Henry and others in the amount of $21,657.94. This penalty was based upon unpaid Employer Withholding Taxes owed by Lisa Transportation Company. Henry was an officer of that company. Henry further alleges that he filed a Claim for Refund for the amount of $1,300.79, which had been seized by the Internal Revenue Service for payment of the penalty assessed against him. Henry alleges that this amount is in excess of the withholding taxes owed for any one employee of Lisa Transportation Company. Henry's claim for a refund was denied by the Internal Revenue Service, and this action was commenced.

Henry also alleges that in the event that he is required to pay any or all of the penalty assessed against him, he is entitled to indemnification from defendants McKinney and Brown.

Defendant Brown has moved for dismissal of the complaint against him upon the following grounds:

1. That this Court lacks jurisdiction over the subject matter of this case. Fed. R. Civ. P. 12(b)(1);

2. That this Court lacks personal jurisdiction over Brown. Fed. R. Civ. P. 12(b)(2);

3. That the petition fails to state a claim against Brown upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

Title 28 U.S.C. § 1346(a)(1) provides that:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

Brown argues that partial payment of the tax assessed does not confer jurisdiction upon the Court under 28 U.S.C. § 1346(a)(1), apparently inferring that the full amount assessed must be paid as a prerequisite to Henry's claim. Such is not the case.

In Flora v. United States, 362 U.S. 145 (1960), the Court, though holding that § 1346 (a)(1) requires full payment of the assessment before an income tax refund suit is maintainable in District Court, indicated that divisible taxes, such as excise taxes, "present an entirely different problem with respect to the full payment role." 362 U.S. at 171, n.37. In such a case, only the amount of tax attributable to any one transaction need be paid in order to invoke § 1346(a)(1), not the entire amount assessed. Employer withholding taxes come within this exception to the "full payment" rule. E.g. Psaty v. United States, 442 F.2d 1154 (3rd Cir. 1971). In Marvel v. United States, 548 F.2d 295 (10th Cir. 1977), the Court said:

> In cases such as the present involving employment or excise taxes, the Tax Court is without jurisdiction and ordinarily the only remedy available to the taxpayer would be full payment of the assessment followed by a suit for refund in district court. In Flora v. United States, 362 U.S. 145, 80 S.Ct. 630, 4 L.Ed.2d. 623, however, the Supreme Court noted that excise taxes are divisible per transaction or event with the result that the jurisdiction of the district courts may be invoked by payment of the assessed taxes for any one transaction or event, without payment of the full assessment. Id. at 175 n.38, 80 S.Ct. 630. This "partial payment" rule has been interpreted by the lower federal courts to include other assessments of "divisible" taxes, including employment and social security taxes, and the IRS has acquiesced in this interpretation. Steele v. United States, 8 Cir., 280 F.2d 89, 90-91.

548 F.2d at 297-298. See also Annot., 22 A.L.R. 3d 8, 202-207 (1968).

Inasmuch as Henry alleges that the amount seized by the Internal Revenue Service was greater than the withholding taxes owed for any one employee of Lisa Transportation Company, this Court has jurisdiction over the subject matter of this complaint and Brown's first ground for dismissal must fail.

Brown next argues that this Court has no personal jurisdiction over him, because, he asserts, there is a lack of diversity of citizenship between plaintiff Henry and defendants Brown and McKinney. In view of the Court's decision with respect to Brown's next argument, this contention need not be addressed at this time.

Brown's final argument is that the complaint should be dismissed as to him because it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

It is well settled that the complaint, when challenged by a motion to dismiss, is to be construed in the light most favorable to the plaintiff, taking as true all well-pleaded allegations. 5 Wright & Miller § 1357.

The test to be applied in determining the sufficiency of the complaint is that

> a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

The complaint, under Fed. R. Civ. P. 8(a) must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The standards to be applied in determining the sufficiency of a complaint are undeniably very liberal; however, it has been pointed out that "more detail often is required than the bald statement by plaintiff that he has a valid claim of some type against defendant." 5 Wright & Miller § 1357, at 596.

In Sutton v. Eastern Viavi Co., 138 F.2d 959, 960 (7th Cir. 1943), it was said:

> No claim for relief is stated if the complaint pleads facts insufficient to show that a legal wrong has been committed, or omits an averment necessary to establish the wrong or fails so to link the parties with the wrong as to entitle the plaintiff to redress.

The Court in Bryan v. Stillwater Board of Realtors, 578 F.2d 1319 (10th Cir. 1977) stated:

> On a motion to dismiss, facts well pleaded are taken as correct, but allegations of conclusions or of opinions are not sufficient when no facts are alleged by way of the statement of the claim. Fed Rules Civ. Proc., rule 8(a)(2), 28 U.S.C.A.; Coopersmith v. Supreme Court of Colorado et al., 465 F.2d 993 (10th Cir. 1972); Olpin v. Ideal National Insurance Company, 419 F.2d 1250 (10th Cir. 1969), cert. denied, 397 U.S. 1074, 90 S.Ct. 1522, 25 L.Ed.2d 809 (1970).

578 F.2d at 1321. See also Kadar Corp. v. Milbury, 549 Fed.2d 230 (1st Cir. 1977); International Harvester Co. v. Kansas City, 308 F.2d 35 (10th Cir. 1962), cert. denied, 371 U.S. 948 (1962); Smith v. Sinclair, 424 F.Supp. 1108 (W.D. Okla. 1976).

In his complaint in this case, Henry states, under the heading of "Jurisdiction, Parties and Nature of Action:"

> 2. The Defendants are as follows: UNITED STATES of AMERICA; BILL McKINNEY, now a resident of Oklahoma County, Oklahoma; BOB BROWN, a resident of Tulsa County, Oklahoma. All facts and circumstances arising hereunder occurred in Tulsa County, Oklahoma.
>
> 3. This action arises under the Internal Revenue laws against the UNITED STATES of AMERICA for the recovery of a penalty illegally and erroneously assessed and collected from Plaintiff under the provisions of 26 U.S.C. §6672, and for indemnification against the Defendants BILL McKINNEY and BOB BROWN.

Defendant Brown is not mentioned thereafter until plaintiff's "Third Cause of Action," wherein it is stated:

> [I]f Plaintiff, EARL E. HENRY, JR., is required to pay any or all of the penalty hereinabove described, then he is entitled to indemnification from Defendants BILL McKINNEY and BOB BROWN, jointly and severally, and they shall hold him harmless for any and all damages that he may incur.

Even though the Court, mindful of the authorities cited above, has viewed the complaint in the most favorable light, the Court cannot conclude that plaintiff has stated a claim against defendant Brown. Henry has done nothing more than allege that defendant Brown is a resident of Tulsa County, Oklahoma; his bald conclusion that Brown is liable to him for indemnification is no more than that and is insufficient to state a claim.

The Court does not, of course, express any opinion as to the ultimate validity of plaintiff's claim, but only concludes that

plaintiff's complaint, in its present state, fails to state a claim upon which relief can be granted, insofar as defendant Brown is concerned.

IT IS THEREFORE ORDERED that the motion to dismiss of defendant Bob Brown is granted.

It is so Ordered this 11 day of May, 1979.

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 78-C-608-B
JAMES G. PAYNE, Defendant.	)	

DEFAULT JUDGMENT

This matter comes on for consideration this _____ day of May, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, James G. Payne, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, James G. Payne, was personally served with Summons and Complaint on December 19, 1978, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, James G. Payne, for the sum of $847.63, plus the costs of this action accrued and accruing.

UNITED STATES DISTRICT JUDGE

APPROVED:

ROBERT P. SANTEE
Assistant United States Attorney

pj

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

United States of America, Plaintiff, vs. 20.40 Acres of Land, More or Less, Situate in Washington County, State of Oklahoma, and Juanita Hill Elkhair, et al., and Unknown Owners, Defendants.	)	CIVIL ACTION NO. 77-C-437-C Tracts Nos. 335 & 335E (Included in D.T. filed in Master File #400-9)

JUDGMENT

1.

NOW, on this 3rd day of May, 1979, this matter comes on for disposition on application of Plaintiff, United States of America, for entry of judgment on stipulations of the parties agreeing upon just compensation, and the Court, after having examined the files in this action and being advised by counsel for the Plaintiff, finds:

2.

This judgment applies to the entire estates condemned in Tracts Nos. 335 and 335E, as such estates and tracts are described in the Complaint filed in this action.

3.

The Court has jurisdiction of the parties and subject matter of this action.

4.

Service of Process has been perfected either personally or by publication notice, as provided by Rule 71A of the Federal Rules of Civil Procedure, on all parties defendant in this cause who are interested in subject property.

5.

The Acts of Congress set out in paragraph 2 of the Complaint filed herein give the United States of America the right, power, and authority to condemn for public use the property described in said Complaint. Pursuant thereto, on October 20, 1977,

the United States of America filed its Declaration of Taking of such described property, and title to the described estate in such property should be vested in the United States of America as of the date of filing said Declaration of Taking.

6.

Simultaneously with filing the Declaration of Taking, there was deposited in the Registry of the Court as estimated compensation for the taking of certain estates in subject tracts a certain sum of money and all of this deposit has been disbursed, as set out below in paragraph 11.

7.

The defendants named in paragraph 11 as owners of the subject property are the only defendants asserting any interest in such property. All other defendants having either disclaimed or defaulted, the named defendants were, as of the date of taking, the owners of the subject property and, as such, are entitled to receive the just compensation awarded by this judgment.

(This finding is based upon "Findings and Recommendations of Special Master" filed herein on January 25, 1979, after evidence had been received at a hearing on ownership held on January 25, 1979.)

8.

The owners of the subject tracts and the United States of America have executed and filed herein on April 20, 1979, certain Stipulations As To Just Compensation wherein they have agreed that just compensation for the estates condemned in subject tracts is in the amount shown as compensation in paragraph 11 below, and such Stipulations should be approved.

9.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power and authority to condemn for public use Tracts Nos. 335 and 335E, as such tracts are particularly described in the Complaint filed herein; and such tracts, to the extent of the estates described in such Complaint, are condemned, and title thereto is vested in the United States of

America, as of October 20, 1977, and all defendants herein and all other persons interested in such estates are forever barred from asserting any claim to such estates.

10.

It Is Further ORDERED, ADJUDGED AND DECREED that on the date of taking, the owners of the estates condemned herein in subject tracts were the defendants whose names appear below in paragraph 11, and the right to receive the just compensation for the estates taken herein in such tracts is vested in the parties so named.

11.

It Is Further ORDERED, ADJUDGED and DECREED that the Stipulations As to Just Compensation mentioned in paragraph 8 above hereby are confirmed; and the sum thereby fixed is adopted as the award of just compensation for the estates condemned in subject tracts, and such award is allocated among the owners as follows:

TRACTS NOS. 335 and 335E

OWNERS:

Marjorie Elkhair ---------- 1/9
(Surviving wife of Ray Andrew Elkhair, Sr., deceased)

Ray Andrew Elkhair, Jr. ---------- 4/9

Cynthia Loraine Elkhair Houle ---------- 4/9

Award of just compensation pursuant to stipulations ---------	$14,000.00	$14,000.00
Deposited as estimated compensation --	$14,000.00	

Allocation of Award:

To Marjorie Elkhair ----------	$1,555.56
To Ray Andrew Elkhair, Jr. --------	$6,222.22
To Cynthia Loraine Elkhair Houle --	$6,222.22
Total ----	$14,000.00

Disbursals:

To Marjorie Elkhair ---------- (per Order April 16, 1979)	$1,555.56	
To Ray Andrew Elkhair, Jr. -------- (per Order 4/19/78 - $4,666.67) (per Order 4/16/79 - $1,555.55)	$6,222.22	
To Cynthia Loraine Elkhair Houle -- (per Order 4/19/78 - $4,666.67) (per Order 4/16/79 - $1,555.55)	$6,222.22	
Total ----------		$14,000.00

Balance due to owners ---------- None

UNITED STATES DISTRICT JUDGE

APPROVED:

HUBERT A. MARLOW
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. JERRY LEE MAYO, SHIRLEY DELLENE MAYO, EDWARD MELVIN TAYLOR, BILLY TAYLOR, a/k/a, BILL E. TAYLOR, a/k/a, WILLIAM S. TAYLOR, if living, or if not, his unknown heirs, assigns, executors and administrators, HOUSING AUTHORITY OF THE CITY OF TULSA, CREDIT CONTROL SYSTEMS CORP., F. W. WOOLWORTH CO., a corporation, and PAYCO OF OKLAHOMA, INC., Defendants.	)	CIVIL ACTION NO. 78-C-270-C

PARTIAL JUDGMENT OF FORECLOSURE

This matter comes on for consideration on this 3rd day of ~~April~~ May, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Housing Authority of the City of Tulsa appearing by Stephen A. Schuller, Attorney at Law, and the Defendants, Payco of Oklahoma, Inc., Credit Control Systems Corp., F. W. Woolworth Co. and Billy Taylor, a/k/a, Bill E. Taylor, a/k/a, William S. Taylor, if living, or if not, his unknown heirs, assigns, executors and administrators, appearing not.

The Court being fully advised and having examined the files herein finds that the Defendant, Housing Authority of the City of Tulsa was served with Summons and Complaint on June 23, 1978, and the Summons and Amendment to Complaint on July 25, 1978; that Credit Control Systems Corp. was served with Summons and Complaint on June 19, 1978, and the Summons and Amendment to Complaint on July 26, 1978; and that F. W. Woolworth Co. was served with Summons and Complaint on June 19, 1978 and with Summons and Amendment to Complaint on July 26, 1978; and that Payco of Oklahoma, Inc. was served with Summons, Complaint and Amendment to Complaint on July 27, 1978, all as is shown on the Marshal's Service herein; and that Defendant, Billy Taylor, a/k/a, Bill E.

Taylor, a/k/a, William S. Taylor, if living, or if not, his unknown heirs, assigns, executors and administrators, Credit Control Systems Corp., F. W. Woolworth Co. and Payco of Oklahoma, Inc. have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court finds that the Defendant, Billy Taylor, a/k/a, Bill E. Taylor, a/k/a, William S. Taylor, was the grantee in a Deed dated September 13, 1976, filed September 13, 1976, in Book 4231, Page 692, records of Tulsa County, wherein Defendants, Edward Melvin Taylor and Billy Taylor agreed to pay the mortgage indebtedness being foreclosed herein.

The purpose of this Partial Judgment is to resolve the issues of the judgment liens outstanding against Billy Taylor, a/k/a, Bill E. Taylor, a/k/a, William S. Taylor, which judgment liens are in favor of Housing Authority of the City of Tulsa, Credit Control Systems Corp., F. W. Woolworth, Co. and Payco of Oklahoma, Inc. The Court finds that judgment, in rem, should be taken against these Defendants and in favor of the United States of America.

NOW IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment, in rem, against the Defendant, Billy Taylor, a/k/a, Bill E. Taylor, a/k/a, William S. Taylor, Housing Authority of the City of Tulsa, Credit Control Systems Corp., F. W. Woolworth Co. and Payco of Oklahoma, Inc.

IT IS FURTHER ORDERED of this Court that such in rem judgment extinguishes these liens insofar as the same relates to the property being foreclosed herein:

> Lot Three (3), Block Twenty-three (23), VALLEY VIEW ACRES ADDITION to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded Plat thereof.

UNITED STATES DISTRICT JUDGE

ROBERT P. SANTEE
Assistant United States Attorney

STEPHEN A. SCHULLER, Attorney for Defendant, Housing Authority of the City of Tulsa

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

TERRY EUGENE McDONALD, individually, and MILDRED McDONALD, individually,	)	
Plaintiffs,	)	
-vs-	)	
SURETY MANAGERS, INC., a California corporation, dba Imperial Insurance Company; FRED HOPKINS and RALPH JOHNSON, dba DEES BAIL BOND COMPANY; WILLIAM DEES, DEWEY WARD, LAURA MAE TURNER, GEORGE TRENT SPAHR, and FREDDIE MARIE QUICK,	)	No. 77-C-305-B
Defendants.	)	

STIPULATION FOR DISMISSAL WITH PREJUDICE

The plaintiffs and the defendants, Fred Hopkins and George Trent Spahr, hereby stipulate that the above styled action may be dismissed with prejudice, the parties acknowledgeing that a compromise settlement has been concluded between the said plaintiffs and the defendants, Fred Hopkins and George Trent Spahr, only.

Terry Eugene McDonald

Terry Eugene McDonald, Plaintiff

Mildred McDonald

Mildred McDonald, Plaintiff

/s/ Robert G Fry

Robert G Fry, Jr. &/or James Elder
40 E. 16th
Tulsa, Okla.
74119

201 W. 5th
Suite 500
Tulsa, Okla. 741

/s/ Hubert W Alexander

Hubert W. Alexander
Attorney for Defendants,
Fred Hopkins and George Trent Spahr
1500 W. Main
Jacksonville, Arkansas 72076

ORDER OF DISMISSAL WITH PREJUDICE

UPON written Stipulation of the parties, the Court hereby orders that this action be, and the same hereby is dismissed with prejudice as to the defendants, Fred Hopkins and George Trent Spahr, only.

/s/ W. Wallace Cook
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BOULDER BANK AND TRUST COMPANY, a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

78-C-250-C

FILED

MAY 2 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT

Pursuant to the Order filed this date,

IT IS ORDERED that Judgment be entered in favor of the defendant, United States of America, and against the plaintiff, Boulder Bank and Trust Company.

ENTERED this 2nd day of May, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

15

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY,
STATE OF OKLAHOMA

H. F. BRUEGGENJOHANN and
MARK BRUEGGENJOHANN, ... Plaintiffs,

v.

FIREMAN'S FUND INSURANCE
COMPANY, a foreign insurance
corporation, and ASSOCIATED
INDEMNITY CORPORATION, a
foreign insurance corporation, ...Defendants.

No. 79-C-68-E

FILED

MAY 2 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

NOW, on this 2nd day of May, 1979, the Plaintiff's Application to Dismiss comes on for regular hearing before this Court pursuant to the Application to Dismiss filed by the Plaintiffs herein, and the Court being fully advised in the premises finds that the Plaintiff's Application to Dismiss should be granted.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the above styled and numbered cause be dismissed as the amount in controversy does not exceed $10,000, and therefore this Court does not retain jurisdiction.

s/ H Dale Cook
JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

MICHAEL LAROY COLEMAN,

Plaintiff

vs

BRICE COLEMAN, et al

Defendants) 78-C-81-C

ORDER ALLOWING DISMISSAL ON PLAINTIFF'S MOTION

Upon plaintiff's motion for leave to discontinue this action it is ordered that the complaint be dismissed.

/S/ H. Dale Cook

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

United States of America, Plaintiff, vs. 49.01 Acres of Land, More or Less, Situate in Osage County, State of Oklahoma, and the Estate of John B. Anderson, deceased, et al., and Unknown Owners, Defendants.	)	CIVIL ACTION NO. 75-C-38-C Anderson Unit Only (Included in D.T. Filed in Master File #268-1407)

J U D G M E N T

1.

Now on this 2nd day of May, 1979, this matter comes on for disposition on application of the Plaintiff, United States of America, for entry of judgment on the Commissioners Report filed herein on March 20, 1979, and the Court, after having examined the files in this action and being fully advised in the premises, finds that:

2.

This judgment applies to the entire estates condemned in Tracts Nos:

2601-3	2601E-17	2601E-23
2601-4	2601E-18	2601E-24
2601-5	2601E-19	2601E-25
2601-6	2601E-20	2601E-26 and
2601-7	2601E-21	2608E-6,
2601-8	2601E-22	

but does not apply to any estates taken in any other tracts included in this same civil action.

(The above listed tracts are all part of the Anderson Unit of ownership which, for subsequent proceedings in this case, was segregated from other units of ownership involved in this case, by the Order of Severance, entered herein on September 2, 1975.)

3.

The Court has jurisdiction of the parties and the subject matter of this action.

4.

Service of Process has been perfected either personally or by publication notice, as provided by Rule 71A of the Federal Rules of Civil Procedure, on all parties defendant in this cause.

5.

The Acts of Congress set out in paragraph 2 of the Complaint filed herein give the United States of America the right, power and authority to condemn for public use the property described above in paragraph 2. Pursuant thereto, on January 28, 1975, the United States of America filed its Declaration of Taking of certain estates in such tracts of land, and title to such property should be vested in the United States of America as of the date of filing such instrument.

6.

Simultaneously with filing the Declaration of Taking, there was deposited in the Registry of this Court as estimated compensation for the estates taken in the subject tracts a certain sum of money, and none of this deposit has been disbursed, as set out below in paragraph 19.

7.

On January 11, 1978 an order was entered herein, appointing three Commissioners to hear evidence and determine the just compensation to be paid for the estates taken in the subject tracts.

8.

On January 11, 1978 written instructions to such Commissioners were filed in this case.

9.

On January 18, 1978 the Plaintiff filed herein an objection to the said instructions and a motion for substitution of certain instructions.

10.

On January 19, 1978 the Court entered a minute order overruling the Plaintiff's said objection to instructions and motion for substitution.

11.

This matter was thereafter set for trial to the Commissioners, beginning on June 6, 1978. The trial was held and the Commissioners filed their report on March 20, 1979.

12.

Thereafter, on March 23, 1979, the Defendant Robert Duffield filed objection (and brief) to the Commissioners Report, and on March 29, 1979 the Plaintiff likewise filed objections (and brief) to such report, and responsive briefs were filed by all of the opposing parties.

13.

On April 19, 1979 a hearing was held on the parties' respective objections to the Commissioners Report, and after argument by counsel all of such objections were overruled. A written order overruling such objections was filed herein on April 28, 1979.

14.

Thus the Commissioners Report, filed herein on March 20, 1979 should be approved by this Court and the Commissioners' findings regarding market value of the subject property should be adopted by this Court as a basis for the award of just compensation for the taking of the subject property.

15.

This judgment will create a deficiency between the amount deposited as estimated just compensation for the estates taken in subject tracts and the amount fixed by the Commission and the Court as just compensation, and a sum of money sufficient to cover such deficiency should be deposited by the Government. This deficiency is set out below in paragraph 19.

16.

The defendants named in paragraph 19 below, as owners of the estates taken in subject tracts are the only defendants asserting any interest in such estates. All other defendants having

either disclaimed or defaulted, the named defendants were (as of the date of taking) the owners of the estates condemned herein and, as such, are entitled to receive the just compensation awarded by this judgment.

17.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power and authority to condemn for public use the tracts listed above in paragraph 2, as such tracts are described in the Complaint filed herein, and such tracts, to the extent of the estates described in such Complaint, are condemned, and title thereto is vested in the United States of America, as of January 28, 1975, and all defendants herein and all other persons are forever barred from asserting any claim to such estates.

18.

It Is Further ORDERED, ADJUDGED and DECREED that on the date of taking in this case, the owners of the estates taken herein in subject tracts were the defendants whose names appear below in paragraph 19, and the right to receive the just compensation for such estates is vested in the parties so named.

19.

It Is Further ORDERED, ADJUDGED and DECREED that the Commissioners Report filed herein on March 20, 1979 hereby is approved and the sum therein fixed by the Commissioners is adopted as the award of just compensation for the taking of the subject property, as shown by the following schedule:

ALL TRACTS LISTED IN PARAGRAPH 2
(Estates Taken as Described in Complaint)

OWNERS:

Robert Duffield and
Industrial Western, Inc.

Award of just compensation, for all interests, pursuant to Commissioners Report ---	$37,833.00	$37,833.00
Deposited as estimated compensation -----	$10,400.00	
Disbursed to owners ----------		None
Balance Due to owners ----------		$37,833.00
Deposit deficiency ----------	$27,433.00	

It Is further ORDERED, ADJUDGED and DECREED that the United States of America shall pay into the Registry of this Court for the benefit of the owners the deposit deficiency for the subject tracts as shown above in paragraph 19, in the principal amount of $27,433.00, together with interest on such deficiency at the rate of 6% per annum from January 28, 1975, until the date of deposit of such deficiency sum; and such sum shall be placed in the deposit for subject tracts in this civil action.

After such deficiency deposit has been made, the Clerk of this Court shall disburse the entire sum then on deposit for the subject tracts, as follows:

To - Robert Duffield and

Industrial Western, Inc., jointly ---- $37,833.00.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CHARLES BARNES, JESSE BEAUCHAMP, PAUL EIDSON, HENERY GANN, RANDALL L. McDONALD, THEODORE E. SMITH, JIM QUINTON, JOHN H. LLOYD III, STEPEHN A. HINTON, LARRY E. STEEL, EVERETT F. PARKER, JAMES MONSOUR, J.W. HOWARD, JR., and GARY L. BLOSS, individually,

Plaintiffs,

vs.

AMERICAN PROFESSIONAL SECURITY CORPORATION, an Oklahoma Corporation, et al,

Defendants,

No. 76_c-239-C

FILED

MAY 2 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT

THIS MATTER came on to be heard before the undersigned Judge of the United States District Court for the Northern District of Oklahoma. This matter having been set for trial on the 2nd day of May, 1979, being regularly assigned trial date, and parties having stipulated that this judgment may be entered, and the attorney for the Defendants having expressly waived the notice of the Application for Judgment prior to this hearing; and the Court having examined the files herein finds as follows:

That this Application to enter default judgment is made on the grounds that there is no defense to the action of the plaintiffs and the attorney for the defendants, William Dale, hereby stipulates that the amount due, as prayed for in the Plaintiffs' Complaint of unpaid overtime compensation be awarded in the respective sums of:

	Overtime	Liquidated Damages
Charles Barnes	457.77	457.77
Jesse Beauchamp	1,895.35	1,895.35
Steve Ecker	1,689.50	1,689.50
Paul Eidson	1,965.50	1,965.50
Henry Gann	1,535.23	1,535.23
Randall L. McDonald	1,546.71	1,546.71
Theodore E. Smith	2,628.53	2,628.53
J.W. Howard	1,429.04	1,429.04
Gary Bloss	456.08	456.08
Jim Quinton	2,304.12	2,304.12
Everett F. Parker	132.00	132.00
Larry Steel	2,157.15	2,157.15
John H. Lloyd III	1,440.01	1,440.01
James Monsour	755.68	755.68
Steven Hinton	1,053.89	1,053.89
	$21,447.01	$21,447.01

Making a total judgment in the amount of $42,894.02, plus interest at the rate of ten percent (10%) per annum from the date of judgment plus a reasonable attorneys fee for the use and benefit of Plaintiffs' Counsel, Lloyd K. Holtz, and for costs.

Dated this 2nd day of May, 1979.

UNITED STATES DISTRICT JUDGE

FILED

MAY 1 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

METALS QUALITY CORPORATION,

Plaintiff,

-vs-

ELMERA SMITH KELLEY,

Defendant.

NO. CIV-79-C-8-B

DISMISSAL

For good cause shown and upon motion of the Plaintiff, the above styled and numbered cause is hereby dismissed with prejudice toward the bringing of any further action.

UNITED STATES DISTRICT JUDGE

APPROVED:

RAINEY, ROSS, RICE & BINNS
Suite 735 West, First National Center
Oklahoma City, Oklahoma 73102
Attorneys for Plaintiff

By: _____
RODNEY L. COOK

CRAWFORD & JACKSON
1714 First National Building
Tulsa, Oklahoma 74103
Attorneys for Defendant

By: _____
B. HAYDEN CRAWFORD